No. 91-6194-CFY
Status: GRANTED

Title: Michael Crosby, Petitioner
v.
United States

Docketed:
October 21, 1991

Court: United States Court of Appeals for the Eighth Circuit

Counsel for petitioner: Nyvold,Mark D.

Counsel for respondent: Solicitor General

Entry	Date	Note	Proceedings and Orders
1	Oct 21 1991	G	Petition for writ of certiorari and motion for leave to proceed in forma pauperis filed.
3	Nov 5 1991		Waiver of right of respondent United States to respond filed.
4	Nov 7 1991		DISTRIBUTED. November 27, 1991
5	Nov 19 1991	P	Response requested -- AS. (Due December 19, 1991)
7	Dec 13 1991		Order extending time to file response to petition until January 21, 1992.
9	Jan 17 1992		Brief of respondent United States in opposition filed.
8	Jan 23 1992		REDISTRIBUTED. February 21, 1992
11	Feb 24 1992		REDISTRIBUTED. February 28, 1992
13	Mar 2 1992		Petition GRANTED.
			**********
14	Mar 9 1992	G	Motion of petitioner for appointment of counsel filed.
15	Mar 23 1992		Motion for appointment of counsel GRANTED and it is ordered that Mark D. Nyvold, Esquire, of St. Paul, Minnesota, is appointed to serve as counsel for the petitioner in this case.
16	Apr 6 1992		Joint appendix filed.
17	Apr 15 1992		Brief amicus curiae of American Civil Liberties Union filed.
18	May 21 1992		Brief of respondent United States filed.
19	Jun 10 1992		Record filed.
		*	Original record U.S. District Court, District of Minnesota (1 Box)
20	Jun 10 1992		Record filed.
		*	Partial proceedings U.S. Court of Appeals, Eighth Circuit.
21	Jul 10 1992		CIRCULATED.
22	Aug 21 1992		SET FOR ARGUMENT MONDAY, NOVEMBER 9, 1992, (4TH CASE).
23	Nov 9 1992		ARGUED

No._____

In the Supreme Court of the United States

October Term, 1991

Michael J. Crosby, Defendant-Petitioner,

vs.

United States of America, Plaintiff-Respondent

Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Eighth Circuit

Michael J. Crosby
88239-012
P.O. Box 3007
Terminal Island,
CA 90731

Pro Se

Question Presented

1. Whether the Federal Rules of Criminal Procedure, case law, and the Constitution permit the trial in absentia of a defendant who is not present at the commencement, or any later stage, of his trial?

Table of Contents

	Page
Question Presented for Review	i
Table of Contents	ii
Table of Authorities	iii
Motion for Leave to Proceed In Forma Pauperis	v
Parties to the Proceeding Below	1
Opinion Below	1
Jurisdiction	1
Constitutional Provisions Involved	1-2
Statement of the Case	2
Reasons for Granting the Writ	3
Conclusion	11
Appendix A (Opinion of the Eighth Circuit Court of Appeals)	A1-15
Appendix B (Affirmance of District Court Judgment)	B1
Appendix C (Order Denying Petition for Rehearing)	C1
Appendix D (Oct. 16, 1990 letter from 8th Cir. Court of Appeals)	D1
Appendix E (Dec. 28, 1990 Order of District Court)	E1
Appendix F (January 9, 1991 letter from 8th Circuit Court of Appeals)	F1
Appendix G (January 21, 1991 letter from Petitioner's Counsel to 8th Circuit)	G1
Appendix H (February 15, 1991 Letter from 8th Circuit)	H1

Table of Authorities

	Page
Cases	
Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963)	6
Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968)	6
Diaz v. United States, 223 U.S. 442 (1912)	4-8
Falk v. United States, 15 App. D.C. 446 (1899), cert. denied, 180 U.S. 636 (1901)	7
Government of Virgin Islands v. George, 680 F.2d 13 (3rd Cir. 1982)	6
Parker v. United States, 184 F.2d 488 (4th Cir. 1950)	6
Pearson v. United States, 325 F.2d 625 (D.C. Cir. 1963)	6
Taylor v. United States, 414 U.S. 17 (1973)	4
United States v. Alessandrello, 637 F.2d 131 (3rd Cir. 1980), cert. denied, 451 U.S. 949 (1981)	8
United States v. Brown, 571 F.2d 980 (6th Cir. 1978)	8
United States v. Garcia-Turino, 458 F.2d 1345 (9th Cir. 1972)	6
United States v. Gregorio, 497 F.2d 1253, (4th Cir. 1974), cert. denied, 419 U.S. 1024 (1974)	9
United States v. Hernandez, 842 F.2d 82 (5th Cir. 1988)	6
United States v. Hudson, 313 F.Supp. 422 (D.C. Del. 1970)	6
United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1975)	7
Constitution	
United States Constitution, Amendment V	2, 8
United States Constitution, Amendment VI	2, 8
Rules	
Federal Rule of Criminal Procedure 43(b)	3, 4
Miscellaneous Authority	
Phillipine Civil Government Act, Section 5	5
Original Advisory Committee Note to Federal Rule of Criminal Procedure 43	6

No._____

In the Supreme Court of the United States

October Term, 1991

Michael J. Crosby, Defendant-Petitioner,

vs.

United States of America, Plaintiff-Respondent

Petition for a Writ of Certiorari to
the United States Court of Appeals
for the Eighth Circuit

The Petitioner, Michael J. Crosby, petitions for a Writ of Certiorari to review the judgment of the United States Court of Appeals for the Eighth Circuit in this case.

Parties to the Proceeding Below

United States of America

Michael J. Crosby

Opinion Below

The opinion of the Court of Appeals (Appendix A, infra, 1-15) is reported at 917 F.2d 362 (8th Cir. 1990).

Jurisdiction

The judgment of the Court of Appeals (Appendix B, infra, 1) was entered on September 30, 1991, nunc pro tunc to January 24, 1991.

This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

Constitutional Provisions Involved

United States Constitution, Amendment V.

"No person shall . . . be deprived of life, liberty, or property, without due process of law . . . ."

United States Constitution, Amendment VI.

"In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial . . . [and] to be confronted with the witnesses against him . . . ."

Statement of the Case

The district court tried Petitioner in absentia when he did not appear for trial on the scheduled starting date, October 12, 1988. The jury returned its verdicts on November 18, 1988, finding Petitioner guilty of twenty-five counts of mail fraud in violation of 18 U.S.C. 1341, convicting two co-defendants jointly tried of various mail fraud counts, and acquitting one jointly tried co-defendant.

On August 21, 1989, the district court sentenced Petitioner to four consecutive executed five-year terms, suspended imposition of sentence on three counts, and placed Petitioner on probation for five years. The probationary term was ordered to commence when Petitioner was completed his sentences on the other counts. As a condition of probation the court ordered Petitioner to pay restitution in the amount of $550,000 during the period of his probation. Petitioner is presently serving his sentences.

Petitioner appealed his convictions to the Eighth Circuit Court of Appeals. His convictions were affirmed by a panel of that

court, but his case was remanded to the district court for reconsideration of the restitution order. (See 8th Cir. opinion, App. A at p. 15 and App. D, Letter from 8th Cir. to counsel, dated Oct. 16, 1990). On remand the district court modified the restitution to $240,035. (See App. E, December 28, 1990 Order from district court resubmitting case to the 8th Circuit). On March 4, 1991, Petitioner filed a petition for rehearing with a suggestion for rehearing en banc on the issue of trial in absentia and the district court's failure to replace his attorney prior to trial because of an irreconcilable conflict. The Circuit Court denied the Petition in an order dated May 8, 1991. (See Appendix C).

The facts underlying Petitioner's convictions are not relevant to the issue on which he seeks the Writ, and the facts relating to his trial in absentia are stated in the Eighth Circuit's opinion at pages A2-3.

Reasons for Granting the Writ

The Eighth Circuit held that Mr. Crosby had waived his right to be personally present for his trial based on the trial court's findings that he knew when his trial was to begin and the inconvenience to the government and its witnesses if a separate trial had to be held for Crosby. Petitioner does not discount the seriousness of the dilemma a court faces when a defendant with apparent knowledge of his trial date does not appear for his trial, but there is no avoiding the plain fact neither this factor, nor the inconvenience of retrying the case later after the absent defendant returns, is relevant in applying Federal Rule of Criminal

Procedure 43(b), which states:

> (b) Continued present not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present
>
> > (1) Is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial . . .) (emphasis added).

The Writ should be granted because the Eighth Circuit has ignored the plain wording of Rule 43 and the analysis of the Supreme Court case that gave rise to the Rule, Diaz v. United States, 223 U.S. 442 (1912). Although application of Rule 43(b) may impose a hardship on courts, prosecutors, and witnesses, the Supreme Court in Diaz and the drafters of Rule 43(b) decided to place a defendant's right to be present at his trial ahead of these considerations. That other Circuit Courts of Appeal have on grounds of expediency refused to apply the Rule as written and have devised factors for determining whether a court may proceed with a trial in the absence of a defendant, factors that have no logical connection to the plain wording of Rule 43(b), simply does not justify ignoring the Rule. Our analysis of Diaz and Rule 43(b), which we provided to the Eighth Circuit panel that decided this case, makes this clear.

The drafters of Rule 43(b) relied on Diaz v. United States because it stated the current law concerning the permissibility of trials in absentia. See, Taylor v. United States, 414 U.S. 17, 19

(1973). Diaz had been charged with non-capital murder in the Philippines. On two occasions during the trial he voluntarily absented himself, expressly waiving his right to be present. Diaz, 223 U.S. at 453. A Philippine statute required a defendant's presence at arraignment, at plea of guilty and judgment, and entitled him to be present at every other stage of the proceedings Id. The issue on appeal was not whether Diaz voluntarily waived his right to be present, but whether, under the applicable statute, he had the power to absent himself Id.

As a further aid to reaching a decision, the Supreme Court looked to Section 5 of the Philippine Civil Government Act, which granted a criminal defendant "the right to be heard by himself and counsel . . . ." Diaz, 223 U.S. at 454. If the Act made Diaz's presence indispensable, it was irrelevant that the Philippine statute in question prevented a waiver, as it could not lessen the force of the Act, a superior law. The Supreme Court characterized the Act as similar to the Sixth Amendment right to be present at one's trial, and that because the Act was intended to embody the constitutional rights enjoyed by United States citizens, the Act should be interpreted just as the Sixth Amendment right to present at trial would be interpreted in the United States. 223 U.S. at 455.

The Supreme Court then reviewed United States law concerning trial in absentia and concluded that the prevailing rule was "that if, after a trial has begun in [the defendant's] presence, he voluntarily absents himself, this does not nullify what has been

done or prevent the completion of the trial . . . ." 223 U.S. at 455-56 (citations omitted). Thus, the Philippine statute requiring a defendant's presence at arraignment, plea, and judgment, and entitling him to be present him at all other stages, was to be applied in a fashion recognized and understood in the United States, that is, to permit the continuation of a trial of a defendant, who initially present, voluntarily absented himself. There can thus be no doubt that Rule 43, which incorporates Diaz,[1] does not permit the trial in absentia of a defendant not initially present. Numerous cases applying Rule 43 have read the rule exactly this way.[2]

---

[1] The language in Rule 43(b) that a defendant who voluntarily absents himself must have been initially present before trial can proceed in his absence is not surplusage or the result of inadvertence on the part of the Rule's drafters. Paragraph two of the original committee note to Rule 43 says:

> The second sentence of the rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself after the trial has been commenced in his presence, Diaz v. United States, 223 U.S. 442, 455 (1912). . . .

[2] Pearson v. United States, 325 F.2d 625, 627 (D.C. Cir. 1963); Cross v. United States, 325 F.2d 629, 631 (D.C. Cir. 1963); Cureton v. United States, 396 F.2d 671, 675 (D.C. Cir. 1968); United States v. Miller, 463 F.2d 600, 603 (1st Cir.); cert. denied, 409 U.S. 956 (1972); Government of Virgin Islands v. George, 680 F.2d 13, 15 (3rd Cir. 1982); Parker v. United States, 184 F.2d 488, 489 (4th Cir. 1950); United States v. Hernandez, 842 F.2d 82, 84 (5th Cir. 1988); United States v. Garcia-Turino, 458 F.2d 1345, 1346 (9th Cir. 1972); United States v. Hudson, 313 F. Supp. 422, 426, (D.C. Delaware, 1970). Although these cases do not involve the same factual scenario as Petitioner's case, that is, a defendant who was not initially present for the beginning of his trial, they discuss Rule 43 in a way that makes clear that it is not permissible to try a defendant who is not present at the commencement of his trial.

Significantly, Diaz expressly recognized the problem that defendants who have absented themselves can create for the judicial system, but it did not allow this to modify what it recognized as a clear-cut rule, namely, that a trial actually pending before a jury may proceed as to an absent defendant only if he was initially present:

> Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458 quoting Falk v. United States, 15 App. D.C. 446 460-61 (1899), cert denied, 180 U.S. 636 (1901).

The Eighth Circuit, instead of applying Rule 43 as written and as it was intended to apply, followed the reasoning of United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976) to find that Petitioner's absence at trial, despite his knowledge of when the trial was to begin, plus the inconvenience to the government in retrying the case, equaled a waiver by Petitioner of his right to be present at trial. Peterson, however, clearly misreads Diaz in reasoning erroneously to the conclusion that knowledge of the trial date, plus inconvenience to the government and witnesses, constitutes a waiver.

The following quotation from Peterson proves that it misreads Diaz:

> [i]n speaking of a defendant's voluntarily absence, "after the trial has begun" the Diaz court was referring merely to the factual context in which that particular defendant's voluntary waiver occurred-i.e., after the commencement of his trial.

524 F.2d at 184.

This quote reveals that Peterson incorrectly reads not only Diaz, but the many cases Diaz cited when it concluded that the majority rule in the United States is that a defendant may be tried in absentia only if he has been initially present at his trial. 223 U.S. at 455-56 (citations omitted). It is true that the decision in Diaz did not specifically turn on whether the Diaz's absence occurred before or after trial began, but this was because the precise issue to be decided was simply whether the Diaz had the ability under the applicable Philippine statute to voluntarily waive his presence. However, in light of Diaz's clear statement of the limits on trials in absentia, the factual context in which Diaz's waiver occurred was certainly not irrelevant. If Diaz had absented himself before trial, the case undoubtedly would not have been decided the same way and the conviction would have been reversed because Diaz made it clear that a trial may proceed only as to a defendant who was initially present. 223 U.S. at 455.

Furthermore, Peterson ignores that a defendant's Rule 43 right (the antecedents of which are in the common law as well as the constitution) to be present at trial is intended to be broader than his constitutional right (rooted in the 5th and 6th Amendments) to be present at trial. United States v. Alessandrello, 637 F.2d 131,138 (3rd Cir. 1980), cert. denied, 451 U.S. 949 (1981). United States v. Brown, 571 F.2d 980, 986 n.5

(6th Cir. 1978).

Peterson, and the cases citing it or otherwise relying upon its line of reasoning, have thus ignored the very point about Diaz that led the Supreme Court Advisory Committee to draft Rule 43 in a way that specifically limits trials in absentia to defendants who voluntarily absent themselves after their trials commence. The decision in Peterson, and the other cases that reach the same result, as well as the panel opinion in this case, are therefore not well-founded in law and should not be followed.[3]

There is no question that our Constitution and our common law place such a high value upon a defendant's opportunity to observe all stages of his trial and to assist in his defense that it is willing to permit a trial to proceed in a defendant's absence only if that absence is voluntary. United States v. Gregorio, 497 F. 2d 1253, 1258-59(4th Cir. 1974), cert. denied, 419 U.S. 1024 (1974). Because the presence of a defendant at the beginning of trial helps guarantee that any later absence is voluntary, Rule 43(b) makes a defendant's initial presence indispensable to a continuation of the trial in his later absence. Because the Eighth Circuit's decision in Petitioner's case cannot be squared with the plain meaning of Rule 43(b) and its common law and constitutional antecedents, and because this issue is one this Court has not directly ruled upon and it is likely to reoccur, this Court should grant the writ.

---

[3] We premise our argument that rehearing should be granted primarily upon the Eighth Circuit's opinion's incorrect application of Diaz and Rule 43. However, we point out that the panel opinion misconstrued at least one important fact in deciding that the District Court had proceeded reasonably in trying Crosby even though he was not initially present. The panel opinion states that the court delayed trial for five days trying to obtain Crosby's presence before deciding to proceed with the trial in his absence. This is not correct. The trial began on Wednesday, October 12, 1988. After Crosby did not appear that day, the court announced that it would wait until Monday, October 17, 1988 to decide whether trial should proceed in Crosby's absence (T. 35-40) The next day, Thursday, October 13, the District Court declared Crosby's bond forfeited and made Findings of Fact and Conclusions of Law that trial in absentia was appropriate (T. 63-65). The court then announced that trial would proceed on Monday, October 17 (Ibid). Thus, the court did not wait five days before deciding to proceed with the trial. Furthermore, because the court had earlier announced the trial would be in session only Monday through Thursday of each week (T. 34), the trial was in effect delayed only two days, Wednesday October 12, and Thursday, October 13.

Conclusion

I therefore respectfully request that the Court grant the Writ.

Dated: 11 Oct. 91

Michael Crosby

Michael Crosby

BEST AVAILABLE COPY

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-5450

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
v.	*	District Court for the
	*	District of Minnesota.
Michael J. Crosby,	*	
	*	
Appellant.	*	

Submitted: May 18, 1990

Filed: October 16, 1990

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Michael J. Crosby did not appear in court on the date set for commencement of his criminal trial, was tried in absentia, and was convicted. The issues in this case revolve primarily around this somewhat unusual circumstance and whether Rule 43 of the Federal Rules of Criminal Procedure applies because Crosby was not present when the trial commenced. We hold that a defendant who does not appear for his criminal trial, including the commencement of it, waives the protections of Rule 43 and the rights incorporated in that rule. We affirm the conviction.

Crosby was charged, together with Martin Cheatham, James Sannes and Jack Cunningham, with numerous criminal offenses arising

A1

out of a fraudulent scheme in which customers paid for, but never received, silver commemorative medallions. The facts are set out in detail in United States v. Cheatham, 899 F.2d 747, 748-50 (8th Cir. 1990), and for the most part are immaterial to the issues presented in this case. It suffices to say that the case was set for trial on October 12, 1988. Crosby was present at a pretrial conference on August 15, 1988, when the court[1] advised counsel for all parties of the trial setting. On September 12, 1988, the clerk sent a notice to all counsel confirming the date. On September 30, 1988, Crosby was present at a pretrial conference and, again, the court notified the parties and attorneys of the October 12 trial date. At that time, Crosby's counsel informed the court that he had no objection to the October 12 trial setting. On October 7, the trial court heard various motions which Crosby made through his counsel, and again the trial setting of October 12 was referred to by court and counsel.

On October 12, 1988, Cheatham, Sannes and Cunningham and their counsel appeared, ready for trial. Crosby failed to appear. The district court ordered a warrant issued and executed. As the district court stated in its order entered on October 14, delaying trial until October 17, "all other counsel, all other parties, the judge, all court personnel, and 54 jurors were present and ready to commence trial." United States v. Crosby, No. 3-88 CR 40(1), slip op. at 2 (D. Minn. Oct. 14, 1988). The marshal's office informed the court and counsel it was unable to locate Crosby at his residence. The order delaying trial stated: "[A] search of his residence by the Marshals would indicate that the residence has been abandoned by the defendant Crosby." Id. at 2-3. The district court ordered Crosby's bond of $100,000 forfeited and found that Crosby "deliberately, voluntarily, knowingly, and without justification failed to be present at the designated time and place

[1]The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

for the trial of the action." Id. The court further found that no evidence was presented as to the defendant's whereabouts and there was no reasonable probability that he could be located shortly or the trial rescheduled with Crosby in attendance. Id. Observing that the government had listed eighty-three potential witnesses and more than four-hundred proposed exhibits for the trial, the district court found that rescheduling posed extreme difficulties and that undertaking two separate trials would place a substantial burden on the government and the court. The court found that Crosby "voluntarily waived his constitutional right to be present during the trial" of the action and "[t]he public interest in proceeding with the trial in the absence of . . . Crosby outweigh[ed] the interest of the defendant Crosby to be present during the conduct of the trial. . . ." Id. at 4.

The trial commenced October 17, and the jury rendered a verdict November 18, 1988, finding Crosby guilty on twenty-five counts of mail fraud. Crosby was arrested on June 14, 1989 and later sentenced to four consecutive five-year terms on twenty-two of the counts; the trial judge suspended imposition of sentence on the three remaining counts, and placed Crosby on five years probation to commence upon completion of the sentences on the other counts, conditioned upon payment of $550,000 restitution to the victims during the period of probation. Insofar as other facts are material to the issues raised, they will be set forth with respect to each of the arguments.

I.

Crosby argues that Rule 43 of the Federal Rules of Criminal Procedure plainly requires his presence at the commencement of

trial as a prerequisite to continuing the trial in his absence.[2] He argues that Rule 43 incorporates preexisting law as set forth in Diaz v. United States, 223 U.S. 442 (1912). In Diaz, a criminal defendant voluntarily absented himself from his own trial on two separate occasions, but nonetheless consented that the trial should proceed without him. Id. at 445. Diaz appealed his conviction on the ground that his absences from trial prevented him from exercising his constitutional right to confront all witnesses who testified against him. The Supreme Court rejected Diaz's claim, relying on the prevailing rule that:

> [W]here the offense is not capital and the accused is not in custody, . . . if, after the trial has begun in his presence, [the defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Id. at 455 (citations omitted). Diaz dealt only with the situation where a trial had commenced and the defendant thereafter voluntarily absented himself.

---

[2]Rule 43 provides in relevant part:

> (a) **Presence Required.** The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) **Continued Presence Not Required.** The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> > (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial) . . . . (emphasis added).

In essence, Crosby's argument is based upon the plain language of Rule 43. Crosby interprets paragraph (b) of Rule 43 to say that before a court can try a criminal defendant in absentia, the defendant must have at least been present at the outset of the trial. Crosby recognizes that a number of other circuits have held contrary to his position, but criticizes the reasoning in those decisions and particularly their treatment of Diaz. He also points to the extreme prejudice resulting from his absence at trial. On the strength of these two points, Crosby asks us to set aside the district court decision and remand this case for a new trial.

This circuit has not yet dealt with the application of Rule 43 where a criminal defendant such as Crosby is tried and convicted in absentia. Other circuits facing the issue have allowed convictions to stand on a theory of waiver. We are persuaded that we should do likewise.

The notes of the advisory committee on rules make clear that the first sentence of Rule 43 is a restatement of existing law. Fed. R. Crim. P. 43, notes of advisory committee on rules (note 1). We are satisfied that the language of Rule 43 does no more than restate the holding in Diaz. The reasoning in Diaz applies equally to the factual circumstances in this case where the defendant fails to appear for commencement of trial, as it does in the situation where the defendant appears at the commencement and then absconds. In both cases, the defendant waives his Rule 43 right to be present during trial when he voluntarily absents himself from the courtroom.

In discussing this issue in Government of the Virgin Islands v. Brown, 507 F.2d 186, 189 (3d Cir. 1975), Judge Rosenn pointed out that Rule 43 was merely a paraphrase of the holding in Diaz. In Brown, the defendant was absent from court on the first morning of voir dire. He appeared in court that afternoon, made no

explanation for his earlier absence, and observed the remaining voir dire examination without making any objection. Brown was present throughout the remainder of his trial. Following conviction, Brown appealed to the Third Circuit, arguing that conducting the voir dire proceedings of the first morning in his absence violated his constitutional and statutory rights. The Third Circuit rejected his claim, holding that "Brown's willful absence from the voir dire examination . . . was knowing and voluntary, and that this voluntary absence was a waiver of both his constitutional and statutory right to be present at the commencement of his trial." Id. at 189.

We agree with Judge Rosenn that there are no talismanic properties "which differentiate the commencement of a trial from later stages." Id. In fact, the voir dire examination is probably not as critical as cross-examination of the key witnesses, which occurs in the later phases of a trial. It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial. Id. Judge Rosenn did note that the commencement of trial would take on special significance under the rule if the defendant did not know when the trial was to begin, since in that case he could not be said to have knowingly waived his right to be present. Id. In Brown, however, one of the conditions for the defendant's release on bail was that the defendant appear at the start of the trial. Thus, it was clear that the Brown defendant knew his trial date.

The facts in Crosby's case are identical in many respects to those in Brown. Both defendants were released from custody on bail before their trial. Both voluntarily failed to attend the beginning of trial and neither offered any explanation for his absence. Crosby knew beyond question that his trial would start on October 12. In Crosby's case, as in Brown, the district court

painstakingly outlined the times when Crosby received and acknowledged notice of that date.

Our decision to follow Brown is bolstered by the fact that other circuits have treated this issue in similar fashion. In United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976), the Fourth Circuit also concluded that a defendant's voluntary absence at the commencement of trial was a waiver under Rule 43 just as if the defendant had attended the beginning of a trial and then later absconded. The court reasoned that:

> [t]o permit a defendant, free on bail, to obstruct the course of justice by absconding without a compelling reason, after having received actual notice of the time and place of trial, is as inconsistent with the purposes of the rule as to permit a defendant to abscond after the trial has commenced. We therefore hold that a defendant may waive his right to be present at the commencement of his trial just as effectively as he can waive his right to be present at later stages of the proceedings.

Id. at 184.

The Second Circuit in United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir.), cert. denied, Santoro v. United States, 409 U.S. 1063 (1972), reached a similar conclusion, stating:

> Waiver of a constitutional right must be both "knowing" and "voluntary." A defendant who deliberately fails to appear in court does so voluntarily, and thus the important question is whether his absence can be considered a "knowing" waiver. We hold that it can. The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried.

The Tortora Court did not hold that the district court should proceed in absentia in every case in which the defendant voluntarily absented himself, but that the decision of whether to proceed is "within the discretion of the trial judge, to be exercised only when the public interest outweighs that of the voluntarily absent defendant." Id. at 1210.

In United States v. Sanchez, 790 F.2d 245 (2d Cir.), cert. denied, 479 U.S. 989 (1986), the Second Circuit gave further guidance on the parameters of the district court's discretion to try a defendant in absentia. The Sanchez court wrote:

> [D]istrict judges must have broad discretion in determining whether to proceed with a trial in absentia . . . .
>
> In the present case, it is enough that, in a case with more than one defendant, Sanchez waived his right to be present by failing to appear without explanation and while on bail; that some reasonable steps, including a one-day continuation with notification to his attorney and the issuance of a bench warrant, were taken unsuccessfully in response to his non-appearance; that there was no reason to believe that the trial could likely soon be held with Sanchez present; and that severance would impose on the Government the burden of prosecuting two separate trials that would involve substantially the same evidence.

Id. at 251.

Read together, these cases provide the factors a district judge should consider when deciding whether to try a defendant in absentia. They include: the likelihood that the trial can take place with the defendant present, the difficulty of rescheduling, and the burden on the government and inconvenience to jurors of having to undertake two trials, particularly in a multiple defendant case. The district court carefully considered each of these factors before deciding to commence the trial without Crosby. It delayed the trial five days, trying to obtain Crosby's presence,

before finally concluding that it would be unable to secure Crosby. Rescheduling of this case would have greatly disrupted the court's schedule and imposed a burden on the witnesses by requiring many of them to appear a second time.[3] Some of the witnesses were elderly with attendant problems of memory loss and the possibility that they might die before the trial could be rescheduled. In light of these conditions, holding two separate trials, one for three defendants and the other if and when Crosby was found, presented the court and jurors with significant inconvenience. Following the analysis suggested by the Second and Fourth Circuits, we have no difficulty satisfying ourselves that Crosby waived his right to be present at trial and that the district court acted within its discretion in trying Crosby in absentia together with the other three defendants who appeared at trial.

II.

Crosby also contends that the district court erred in failing to remove court-appointed counsel Douglas Altman as Crosby requested in a motion on Friday, October 7, just five days before the scheduled start of trial. We are satisfied that Judge Alsop did not abuse his discretion in denying this last-minute request to remove.

Crosby had attempted to discharge Altman in a motion twenty-nine days earlier, citing at that time a long list of issues on which Crosby and his counsel did not agree. At the previous hearing Altman also asked for permission to withdraw from the case. Magistrate Janis Symchych denied both requests, pointing out that Crosby was not entitled to select the individual attorney who would represent him when he was served by court-appointed counsel.

---

[3]The government had subpoenaed eighty-three witnesses, including witnesses from Virginia, rural Alabama, Wyoming, Iowa, Nebraska, North Dakota, Texas, New York, and Canada.

United States v. Crosby, No. CR 3-88-40, slip op. at 1 (D. Minn. Sept. 23, 1988). Just as Crosby could not select his appointed counsel, he was also not at liberty to discharge that attorney. Id. Magistrate Symchych also concluded that the issues Crosby listed did not raise concern about ineffective assistance of counsel and that Altman could be prepared for trial by October 12. Id. at 1-2.

Shortly before trial, in a hearing before Judge Alsop, Crosby renewed his earlier motion to remove Altman. At that time, Altman again moved for permission to withdraw from the case. Judge Alsop heard the motions in camera and also denied both requests.

In United States v. Hart, 557 F.2d 162, 163 (8th Cir.), cert. denied, 434 U.S. 906 (1977), we held that a district court has broad discretion when determining whether substitution of counsel is warranted. "The trial court, when confronted by such an allegation, has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction." Id. But, "[t]he right to effective assistance of counsel may not be improperly manipulated by an eleventh hour request to obstruct the orderly administration of justice." Id.

It is evident that there were disagreements between Crosby and his counsel. In denying Crosby's second motion to remove, Judge Alsop made a thorough investigation of the conflicts between Crosby and Altman, and made every reasonable effort to resolve them. Most of the difficulty seemed to be over Crosby's concern for obtaining financial documents he believed were necessary to his defense. In particular, there were two areas of concern. First, Crosby claimed that his attorney failed to use court-appointed accounting services to prepare financial summaries of documents stored in Crosby's

garage.[4] Second, Crosby believed that financial records stored in a warehouse in California were also critical to his defense. He complained that Altman would not help him arrange to retrieve these records.[5]

Judge Alsop made every effort to provide a remedy. He had already previously authorized funding for Crosby and his codefendants to employ a professional accountant in preparation for trial. The judge extended the scope of that funding so that Crosby could have the same accounting firm provide whatever additional services Crosby needed with respect to the disorganized financial records. In addition, he arranged for Crosby, if necessary, to personally fly to California to retrieve whatever records were stored there.[6] We are persuaded, as was Judge Alsop, that these two solutions resolved all significant conflicts between Crosby and Altman.

Crosby makes clear that he raises no claim of ineffective assistance of counsel, reserving this for later presentation. The record reveals that Crosby's counsel called numerous witnesses from all parts of the United States and vigorously presented a defense for Crosby. Crosby's counsel spent two days and questioned eight witnesses as part of Crosby's defense. The witnesses were from

---

[4]For at least six weeks before trial Crosby assured Altman that Crosby's father was organizing these records. This turned out to be untrue. Crosby did not inform Altman about the true state of these records until very close to trial. For this reason, Judge Alsop was less than sympathetic when Crosby attempted to lay blame on his attorney for failing to adequately prepare these records.

[5]Crosby contended that these California records were stored randomly throughout a warehouse along with furniture and other papers, and that he was the only person who could identify the relevant items. A problem arose because the conditions of Crosby's bail did not permit him to leave Minnesota. Crosby complained that Altman did not do whatever was necessary to remove this travel restriction.

[6]The record does not reveal whether Crosby went to California.

California, Canada, South Dakota, Texas and Virginia. The defense denied all allegations of fraud and attempted to show that Crosby was merely a poor administrator legitimately trying to establish a non-profit business. The accounting testimony, Crosby's primary bone of contention with respect to the removal of Altman as counsel, was not presented by any of the defendants' counsel. The government's case contains strong evidence against Crosby, including the fact that he received the major share of the proceeds of the fraudulent scheme and controlled the money, and substantial evidence of personal expenditures by Crosby, totaling some $260,000, while bills of the business went unpaid. While there were difficulties between Crosby and his lawyer, there is no evidence in the record of a breakdown in communication or that Altman was prevented from adequately presenting a defense. See United States v. Wagner, 834 F.2d 1474, 1482 (9th Cir. 1987); Lowenfield v. Phelps, 817 F.2d 285 (5th Cir. 1987), aff'd in part, 484 U.S. 231 (1988). The decision whether to remove counsel was completely within the district judge's discretion. We are satisfied that Judge Alsop did not abuse his discretion in this case by denying Crosby's request.

III.

Crosby also argues that he was prejudiced when counsel for defendant Cheatham questioned his brother Phillip Krzyzaniak, regarding whether Crosby knew when the trial was to begin and that he was supposed to be there. When Krzyzaniak took the stand, Cheatham's counsel indicated that he intended to examine Krzyzaniak on a number of issues, but the district court carefully limited the examination to Crosby's knowledge of the trial dates, the fact that he had planned to show up and that he did not. The district court ordered counsel not to examine the witness concerning the bond and who put it up, but that only "flight" evidence was admissible. In his reply brief Crosby argues that admission of evidence of flight requires a showing of immediacy linking flight to the time of

commission or accusation of the offense charged. Crosby claims that evidence probing his voluntary absence from trial does not qualify as flight evidence because it fails this immediacy requirement. He further claims that his absence from trial is irrelevant when determining his guilt or innocence since the absence was not related in time to either the time of the alleged offense or the time of accusation.

We are not convinced by the argument. As the Sixth Circuit explained in United States v. Touchstone, 726 F.2d 1116, 1119 (6th Cir. 1984):

> "[F]light" is generally admissible as evidence of guilt, and . . . juries are given the power to determine "how much weight should be given to such evidence." United States v. Craig, 522 F.2d 29, 32 (6th Cir. 1975), . . . [I]mmediacy "generally only becomes important in those cases where the defendant does not know, or his knowledge is doubtful, about the charges and accusations made against him." United States v. Hernandez-Miranda, 601 F.2d 1104, 1106 (9th Cir. 1979).

See also United States v. Peltier, 585 F.2d 314, 322-24 (8th Cir. 1978), cert. denied, 440 U.S. 945 (1979) (discussing the probative value of flight evidence in determining guilt or innocence). Because Crosby knew the charges against him and his scheduled trial date, there was no abuse of discretion in admitting this evidence.

IV.

Crosby's final argument is that the district court erred in conditioning probation on restitution of $550,000 to the victims of his fraud. He argues that the full $550,000 is not properly related to the offenses for which he was convicted. Crosby cites in his defense United States v. Missouri Valley Construction Co., 741 F.2d 1542 (8th Cir. 1984) (en banc), in which this court stated:

> [W]here a defendant has been charged with crimes against several persons, but convicted on only some of the counts, the court may not order the defendant, as a condition of probation, to make payments to any persons who were not aggrieved by the precise acts charged in those counts on which conviction was had.

Id. at 1547. He argues that under Missouri Valley, the court can only sentence him to pay restitution to those forty-two victims who were expressly named in the indictment. Crosby's reading of Missouri Valley fails to recognize the true issue in that case. In Missouri Valley, the defendant corporation pled guilty to criminal conspiracy. In its sentence, the district judge imposed "as a condition of probation, in lieu of a fine, the requirement that [the corporation] contribute money to a charitable organization that [had] not suffered actual damages or loss from the corporation's criminal offense." Missouri Valley, 741 F.2d at 1544.[7] We vacated the sentence because it required the defendant to pay restitution to someone other than a party "who suffered losses 'caused by the offense for which the conviction was had.'" Id. at 1547.

---

[7]The district judge imposed sentence pursuant to 18 U.S.C. § 3651 (1982 & Supp. II 1984) which was repealed, Act of Oct. 12, 1984, Title II, c. II, § 212(a)(2), 98 Stat. 1987, but which still applies to offenses committed prior to November 1, 1986. The relevant portion of § 3651 states:

> The court may revoke or modify any condition of probation, or may change the period of probation.
> . . . .
> While on probation and among the conditions thereof, the defendant--
> May be required to pay a fine in one or several sums; and
> May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .

While Missouri Valley is not helpful to us, three days after the case before us was argued, the United States Supreme Court held in Hughey v. United States, 109 L. Ed. 2d 408 (1990), that a restitution order under 18 U.S.C. § 3579(a)(1) (1982) is limited to losses caused by the conduct underlying the offense of conviction.

Judge Alsop in his restitution order stated that the total loss for the twenty-five counts for which Crosby was convicted was $291,303. Should the court be without authority to order restitution in the amount of $550,000 for the 412 victims, we believe that under the principles of Hughey the $291,303 restitution figure is undoubtedly sustainable. We are satisfied, however, that the appropriate course is to remand the case to the district court for further consideration of its restitution order in light of Hughey. This panel will retain jurisdiction of this appeal. If either party is aggrieved after the entry of the district court's order reconsidering the restitution award in light of Hughey, we will give further consideration to this issue on an expedited basis.

A true copy.

Attest:

CLERK, U. S. COURT OF APPEALS, EIGHTH CIRCUIT.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-5450MN

United States of America,	*	
	*	
Appellee,	*	
	*	Appeal from the United States
vs.	*	District Court for the
	*	District of Minnesota
Michael J. Crosby,	*	
	*	
Appellant.	*	

JUDGMENT NUNC PRO TUNC

The judgment of the district court is affirmed. This judgment is entered nunc pro tunc to January 24, 1991, the date appellant notified this court of his agreement with the district court's amended judgment and commitment order entered after this court's opinion of limited remand.

Appellant filed a petition for rehearing on other issues, which was denied May 8, 1991. The filing of a petition for rehearing presupposes the existence of a final panel decision and the entry of judgment of this court as required by Rule 36 of the Federal Rules of Appellate Procedure. The record is hereby corrected to show entry of judgment.

September 30, 1991

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit

B1

AMENDED

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

No. 89-5450 MN

United States of America,	*	
	*	
Appellee,	*	
	*	Order Denying Petition
vs.	*	For Rehearing and Suggestion
	*	For Rehearing En Banc
Michael J. Crosby,	*	
	*	
Appellant.	*	

Suggestion for rehearing en banc, filed by the appellant, has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Chief Judge Lay, Judge McMillian and Judge Arnold voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

May 8, 1991

Order Entered at the Direction of the Court:

Michael E. Gans

Clerk, U.S. Court of Appeals, Eighth Circuit.

C1

ited States Court of Appeals
For the Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

(314) 539-3600
FTS: 262-3600

October 16, 1990

Mr. Mark D. Nyvold
3989 Central Avenue, N.E.
Minneapolis, MN 55421

Re: 89-5450MN United States v. Michael J. Crosby

Dear Sir:

Enclosed is a copy of the opinion filed today in the referenced case. This appeal is a limited remand to the district court and the district court will certify its findings to this Court.

Sincerely,

Robert D. St. Vrain

Robert St. Vrain
Clerk of Court (EA)

Enclosure

cc: James E. Lackner
Francis E. Dosal, Clerk (Crim. 3-88-40 (01)
(cert. copy to district court)

D1

AO 72
(Rev. 8 82)

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

UNITED STATES OF AMERICA, 3-88 CR 40(1)

Plaintiff,

v. **ORDER**

MICHAEL J. CROSBY,

Defendant.

Pursuant to the mandate of October 18, 1990, the above entitled action is resubmitted to the Court of Appeals of the Eighth Circuit.

DATED: December 28, 1990.

Donald D. Alsop

DONALD D. ALSOP
Chief U. S. District Judge

E1

137

FILED 12-28-90
FRANCIS E. DOSAL, CLERK
JUDGMENT ENTERED
DEPUTY CLERK'S INITIALS

United States Court of Appeals
For the Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

(314) 539-3600
FTS: 262-3600

January 9, 1991

Mr. James E. Lackner
Assistant U. S. Attorney
234 U. S. Courthouse
110 South Fourth Street
Minneapolis, MN 55401

Mr. Mark Nyvold
3989 Central Avenue, N.E.
Minneapolis, MN 55421

Re: No. 89-5450MN United States of America v. Michael J. Crosby

Dear Counsel:

The Court has received a copy of the district court's December 28, 1990 Amended Judgment and Commitment Order in this case. As you know, this Court's opinion of October 16, 1990 indicated that the Court would retain jurisdiction over the appeal and that either party could ask the Court for further consideration of the matter.

In order to expedite completion of the proceedings in this appeal, the Court has asked me to contact you and ask whether you intend to seek further review of the matter. I would appreciate it if you could respond to this letter by January 20, 1991.

Please feel free to contact me if you have any questions.

Sincerely,

Michael E. Gans
Chief Deputy

MEG/dm

F1

January 21, 1991

Clerk of Court
Eighth Circuit Court of Appeals
1114 Market St.
St. Louis, MO 63101

Re: No. 89-5450MN U.S.A. v. Michael Crosby

Dear Sir:

On behalf of the Appellant I am writing to say that we agree with the December 28, 1990 Amended Judgment and Commitment Order entered by the District Court and we will seek no further consideration of the issue which that order concerns.

Please notify us, however, when judgment is entered by the panel that heard the case as we do intend to seek rehearing on other issues.

Sincerely,

Mark D. Nyvold

G1

United States Court of Appeals
For the Eighth Circuit

U.S. Court & Custom House
1114 Market Street
St. Louis, Missouri 63101

Robert D. St. Vrain
Clerk

(314) 539-3600
FTS: 262-3600

February 15, 1991

Mr. Mark D. Nyvold
386 N. Wabasha
Suite 1300
St. Paul, Minnesota 55602

Re: 89-5450MN United States v. Michael J. Crosby

Dear Mr. Nyvold:

I have brought your letter of January 21, 1991, to the panel's attention, and I have been instructed to inform you that your petition for rehearing should be filed by March 4, 1991.

Please feel free to contact me if you have any questions.

Sincerely,

Michael E. Gans

Michael E. Gans
Chief Deputy Clerk

MEG/ea

cc: James Lackner
Joan Lancaster

H1

MARK D. NYVOLD
ATTORNEY AT LAW
Suite 1300
386 North Wabasha
St. Paul, Minnesota 55102

Telephone
(612) 291-8044

October 11, 1991

RECEIVED
OCT 21 1991
OFFICE OF THE CLERK
SUPREME COURT, U.S.

Mr. William Suter
Clerk of Court
United States Supreme Court
Washington, D.C. 20543

Re: Crosby v. U.S.A.

Dear Mr. Suter:

This letter accompanies Petitioner Crosby's Petition for a Writ of Certiorari. I represented Mr. Crosby before the Eighth Circuit Court of Appeals pursuant to an appointment under the Criminal Justice Act of 1964. Because I am not a member of the bar of this Court, Mr. Crosby has signed his Petition pro se, although I prepared most of it. I would appreciate being advised of the decision on the Petition.

I would also like to add a brief statement to assist the Court in determining the timeliness of the Petition, should any question arise in that area. As the Court will note, the Eighth Circuit's judgment was entered September 30, 1991, nunc pro tunc to January 24, 1991. Mr. Crosby's petition should be considered timely because September 30, 1991 was the earliest date he could have filed his Petition.

The Appendices to the Petition make it clear why the Petition could not have been filed any earlier. When the Eighth Circuit decided Mr. Crosby's appeal, they remanded the case to the district court for reconsideration of the restitution issue. (See Opinion, App. A at 15). The district court completed its review and on December 28, 1990 resubmitted the case to the Eighth Circuit (App. E1). Because no judgment had been entered, I wrote to the Eighth Circuit on January 21 to say that Mr. Crosby agreed with the action the district court had taken on remand and to ask the Circuit Court for notification as to when judgment would be entered as Mr. Crosby would be seeking rehearing (App. G1).

The Eighth Circuit responded to me by letter, dated Feb. 15, 1991, informing me that a petition for rehearing, if any were to be filed, would be due March 4, 1991. The Circuit Court did not then enter judgment nor state when it would be entered. (App. H1).

I filed a petition for rehearing on March 4, 1991, and received a decision on it on May 8, 1991 (App. C1). The Circuit Court still had entered no judgment.

After receiving the Eighth Circuit's decision deny rehearing, I computed the date upon which a Petition for Cert. would have to be filed to be timely. That date was August 6, 1991. As that date approached I realized that judgment still had not been entered in Mr. Crosby's case, and that without a judgment I could not file a Petition for Cert.

I then contacted the Clerk's office at the Eighth Circuit on August 2, 1991, to inform them that Mr. Crosby and I were considering whether to file a Petition for Cert. but that if we were to do so we would need a judgment to petition from. I also told the Clerk's office that a judgment would have to be entered in any event. The clerk I spoke to, Ella Aublee, said the matter would be submitted to the Circuit Court.

When judgment was entered, it was entered nunc pro tunc to January 24, 1991. The judgment itself explains the reasons for this. Mr. Crosby and I have no objection to this if it does not prejudice his right to seek a Petition for a Writ of Cert. nor interfere with his right to seek, within 120 days after the Supreme Court denies the Petition or completes review of his case, a motion for reduction of sentence under Rule 35, Rules of Federal Criminal Procedure (Mr. Crosby falls under the old Rule 35 and can file the motion on his own without Government consent).

Obviously, the Eighth Circuit was not thinking about the possibility that entering judgment nunc pro tunc might preclude Mr. Crosby from filing a Petition for Cert. and subsequently a Rule 35 motion, and just as obviously its action should not be construed to have that effect. Mr. Crosby has proceeded in timely fashion throughout the appellate process and his Petition should be considered timely now.

Please contact me if I can be of further assistance, but I believe this letter and the documents appended to the Petition should clear up and question that may arise as to timeliness.

Sincerely,

Mark D. Nyvold

Mark D. Nyvold

cc: Solicitor General
AUSA Joan Lancaster
Michael Crosby.

ORIGINAL

No. 91-6194

Supreme Court, U.S.
FILED
JAN 17 1992
OFFICE OF THE CLERK

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

MICHAEL CROSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether petitioner could be tried in his absence after he knowingly and voluntarily failed to appear for trial.

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

No. 91-6194

MICHAEL CROSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A1-A15) is reported at 917 F.2d 362.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1991.[1] The petition for a writ of certiorari was filed

---

[1] The opinion of the court of appeals originally was filed on October 16, 1990. Pet. App. A1. In that opinion, the court remanded to the district court for consideration of an issue unrelated to the issue presented by this petition, but the court of appeals retained jurisdiction over the case. Id. at A15. While the case was pending in the district court on remand, the court of appeals denied a petition for rehearing with suggestion

(continued...)

on October 21, 1991. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on 25 counts of mail fraud, in violation of 18 U.S.C. 1341. He was sentenced to 20 years' imprisonment, to be followed by five years' probation. Pet. App. A3. He was also ordered to make restitution in the amount of $240,035. Pet. 3. The court of appeals affirmed. Pet. App. A1-A15.

1. Petitioner and co-defendants Martin Cheatham, James Sannes, and Jack Cunningham devised a fraudulent scheme for selling silver medallions through the mail and by phone. Pursuant to the scheme, purchasers of the medallions were falsely told that a portion of the proceeds would be used to fund a memorial to veterans and were assured that the medallions would increase in value. Ultimately, 412 people bought 5,900 medallions for $550,000. Only about 400 medallions, however, were actually delivered to the purchasers.[2/]

[1/](...continued)
for rehearing en banc. Id. at C1. On September 30, 1991, the court issued an order affirming the judgment of the district court "nunc pro tunc to January 24, 1991." Id. at B1. While that order is somewhat ambiguous, we believe that it is appropriate in calculating the timeliness of the petition to consider the judgment of the court of appeals to have been entered on September 30, 1991.

[2/] The evidence at petitioner's trial is described in the opinion of the court of appeals affirming the convictions of co-defendants Cheatham and Cunningham. United States v. Cheatham, 899 F.2d 747, 748-750 (8th Cir. 1990).

2. On August 15, 1988, petitioner appeared for a pretrial conference, at which the district court set trial for October 12, 1988. On September 12, 1988, the clerk sent a notice to all counsel confirming the date of trial. On September 30, 1988, petitioner attended another pretrial conference, at which the court again advised the parties of the October 12 trial date. On October 7, 1988, petitioner appeared in court for a motions hearing, during which the court made yet another reference to the October 12 trial date. Pet. App. A2; Gov't C.A. Br. 6-7.

Although petitioner's counsel and his three co-defendants appeared for trial on October 12, 1988, petitioner failed to appear. The district court issued a warrant for petitioner's arrest and delayed the start of trial. United States Marshals attempting to execute the warrant were unable to locate petitioner. The Marshals reported to the court that petitioner appeared to have abandoned his residence. Pet. App. A2; Gov't C.A. Br. 7.

On October 14, 1988, the district court issued an order delaying trial until October 17, forfeiting petitioner's $100,000 bond, and finding that petitioner had "deliberately, voluntarily, knowingly, and without justification failed to be present at the designated time and place for the trial of the action." Pet. App. A2-A3. In the order, the court also found that there was no reasonable probability that petitioner could be located or that the trial could be rescheduled with petitioner in attendance. Pet. App. A3. The court noted that the government intended to

call 83 witnesses from all over the United States and Canada and to introduce more than 400 exhibits. The court accordingly found that rescheduling the trial or holding a separate trial for petitioner would impose a substantial burden on the government and the court. Based on its findings, the court held that petitioner had "voluntarily waived his constitutional right to be present during the trial" and that the "public interest in proceeding with the trial in the absence of * * * [petitioner] outweigh[ed] the interest of [petitioner] to be present during the conduct of the trial." Ibid.

Trial was held from October 17 through November 18, 1988, in petitioner's absence. Pet. App. A3. Petitioner was arrested in Florida on May 11, 1989. Gov't C.A. Br. 9.

3. The court of appeals affirmed. Pet. App. A1-A15. It rejected petitioner's argument that Fed. R. Crim. P. 43 prohibits a court from holding a trial after the defendant has absconded except when the defendant is present at the outset of the trial. Id. at A3-A5.[1/] The court determined that "the defendant waives

---

[1/] Fed. R. Crim. P. 43 provides in relevant part:

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided.
>
> (b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,

(continued...)

his Rule 43 right to be present during trial when he voluntarily absents himself from the courtroom." Id. at A5. The court held that, in light of petitioner's voluntary failure to appear, the district court's efforts to locate petitioner, the number of witnesses, and the difficulty of reassembling them, the district court had not abused its discretion by holding trial in petitioner's absence. Id. at A8-A9.[2/]

ARGUMENT

Petitioner contends (Pet. 3-10) that the district court violated his rights under the Constitution and Fed. R. Crim. P. 43 by holding trial in his absence. The court of appeals correctly rejected that contention, and its decision does not conflict with any decision of this Court or any other court of appeals. Further review is therefore unwarranted.

Although a criminal defendant has a right to be present at all stages of the trial, that right may be waived. In Diaz v. United States, 223 U.S. 442, 445, 454-459 (1912), this Court held that such a waiver occurred when a defendant who had appeared at the start of the trial voluntarily absented himself from later

---

[1/](...continued)

> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial) * * *.

[2/] The court of appeals also rejected petitioner's claims that the district court erred in refusing to replace petitioner's court-appointed counsel five days before trial and in conditioning petitioner's probation on the payment of restitution to his victims. Pet. App. A9-A15. Petitioner does not renew those claims in this Court.

proceedings. In Taylor v. United States, 414 U.S. 17, 19-20 (1973), the Court reaffirmed its holding in Diaz and emphasized that "mere voluntary absence from * * * trial" may constitute an "effective waiver."

Contrary to petitioner's contention (Pet. 4-9), this Court's decisions in Diaz and Taylor did not turn upon the fact that the defendants in those cases were present at the commencement of their trials. In Diaz, the Court quoted with approval the reasoning of a court of appeals decision that had concluded that a defendant may waive the right to be present at trial by voluntarily failing to appear:

> The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of the courts and juries and turn them into a solemn farce * * *. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458 (quoting Falk v. United States, 15 U.S. App. D.C. 446, 460-461 (1899), cert. denied, 181 U.S. 618 (1901)). In Taylor, the Court similarly reasoned that "the governmental prerogative to proceed with a trial cannot be defeated by conduct of the accused that prevents the trial from going forward." 414 U.S. at 20 (quoting Illinois v. Allen, 397 U.S. 337, 349 (1970) (Brennan, J., concurring)).

The reasoning of Diaz and Taylor fully applies when, as in this case, the defendant voluntarily and knowingly fails to appear for the commencement of the trial. A defendant who fails to attend even the start of his trial demonstrates at least as much disregard for the judicial system as a defendant who is present at the start of trial but later fails to appear. In either situation, suspending the trial would reward such egregious conduct by preventing a trial "until the accused person himself should be pleased to permit it." Diaz v. United States, 223 U.S. at 457 (quoting Falk v. United States, 15 U.S. App. D.C. at 454). This Court's decisions in Diaz and Taylor make clear that the Constitution does not require such a result.

Nor is that result required under Fed. R. Crim. P. 43. While Rule 43(a) recognizes the defendant's right to be present throughout the trial, Rule 43(b) makes it clear that the defendant may waive that right. Rule 43(b) provides that "the progress of [a] trial * * * shall not be prevented" when a defendant, "initially present, * * * is voluntarily absent after the trial has commenced." The Rule states that under those circumstances, "the defendant shall be considered to have waived the right to be present." Fed. R. Crim. P. 43(b). Petitioner argues (Pet. 6) that Rule 43(b), by implication, forbids the conduct of a trial in absentia when a defendant is not initially present for the trial but, instead, absconds prior to the trial's commencement. The Rule, however, should not be read in that fashion. As the court of appeals recognized, Rule 43(b) was

intended merely to restate the holding in Diaz. Pet. App. A5 (citing Advisory Committee note on Fed. R. Crim. P. 43). Thus, the Rule addresses the situation of a defendant who initially appears for trial, but later fails to appear, because that was the situation before the Court in Diaz. By providing for a waiver in that situation, the Rule was not intended to preclude a waiver in other situations. As the court of appeals correctly concluded, Pet. App. A3-A6, Rule 43(b) does not prevent the court from determining that a waiver has occurred when a defendant who has been arraigned and released on bail knowingly and voluntarily fails to show up for trial at all.

Every other court of appeals to address the issue has likewise concluded that a defendant's knowing and voluntary failure to appear for trial may constitute a waiver of the right to be present for the trial. See United States v. Houtchens, 926 F.2d 824, 826-827 (9th Cir. 1991); United States v. Sanchez, 790 F.2d 245, 248-252 (2d Cir.), cert. denied, 479 U.S. 989 (1986); United States v. Crews, 695 F.2d 519, 520-521 (11th Cir. 1983); United States v. Peterson, 524 F.2d 167, 184 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976); Government of the Virgin Islands v. Brown, 507 F.2d 186, 189 (3d Cir. 1975); United States v. Tortora, 464 F.2d 1202, 1208 (2d Cir.), cert. denied, 409 U.S. 1063 (1972).

The decisions cited by petitioner (Pet. 6 n.2) are not to the contrary. United States v. Hernandez, 842 F.2d 82, 84 (5th Cir. 1988); Government of the Virgin Islands v. George, 680 F.2d

13, 14-15 (3d Cir. 1982); United States v. Miller, 463 F.2d 600, 602-603 (1st Cir.), cert. denied, 409 U.S. 956 (1972); United States v. Garcia-Turino, 458 F.2d 1345, 1346 (9th Cir.), cert. denied, 409 U.S. 951 (1972); Pearson v. United States, 325 F.2d 625, 626-627 (D.C. Cir. 1963); and Parker v. United States, 184 F.2d 488, 490 (4th Cir. 1950), each involved a criminal defendant who voluntarily absented himself from trial proceedings after having appeared for the commencement of trial; in each case, the court applied Fed. R. Crim. P. 43 to uphold the conduct of a trial in the defendant's absence. In Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968), the court held that under Rule 43 a trial may be held in the defendant's absence when the defendant absconds after the start of the trial, if the defendant's absence is knowing and voluntary; the court remanded, however, for further proceedings on the issue of whether the defendant's absence in that case was knowing and voluntary. In Cross v. United States, 325 F.2d 629, 631-632 (D.C. Cir. 1963), the court reversed a conviction, holding -- on facts quite different from those of the instant case -- that the evidence was insufficient to establish that the defendant had waived his right to be present throughout the trial. Finally, United States v. Hudson, 313 F. Supp. 422, 426-427 (D. Del. 1970), did not concern review of a conviction following a trial in absentia. Rather, it concerned a petition by sureties on a bail bond to vacate an order forfeiting the bond. In response to the petitioners' argument that they should not be penalized for the defendant's failure to

appear for trial because the trial could have been held in the defendant's absence, the district court in Hudson suggested that the defendant could not have been tried in his absence under Rule 43 because he was not initially present for the trial. Id. at 426. That suggestion was dictum, however, because the court went on to reject the petitioners' argument as "completely irrelevant" to the validity of the order of forfeiture. Id. at 427.

* * * * *

Petitioner does not challenge the determination by both courts below that he knew when the trial was scheduled to commence and that he voluntarily failed to appear on that date. Under those circumstances, the courts correctly concluded that he had waived his right to be present at the trial.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

J. DOUGLAS WILSON
Attorney

JANUARY 1992

IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1991

RECEIVED
HAND DELIVERED
JAN 21 1992
OFFICE OF THE CLERK
SUPREME COURT, U.S.

MICHAEL CROSBY, PETITIONER)
)
V)
)
UNITED STATES OF AMERICA)

NO. 91-6194

CERTIFICATE OF SERVICE

It is hereby certified that all parties required to be served have been served copies of the BRIEF FOR THE UNITED STATES IN OPPOSITION by mail on January 21, 1992.

MICHAEL J. CROSBY
#88239-012
P.O. BOX 3007
TERMINAL ISLAND, CA 90731

Kenneth W. Starr
KENNETH W. STARR
Solicitor General

January 21, 1992

Supreme Court, U.S.
FILED
APR 6 1992
OFFICE OF THE CLERK

No. 91-6194

In The

Supreme Court of the United States

October Term, 1991

MICHAEL CROSBY,

Petitioner,

vs.

UNITED STATES,

Respondent.

On Writ Of Certiorari To The United States Court Of Appeals For The Eighth Circuit

JOINT APPENDIX

MARK D. NYVOLD*
(Appointed by this Court)
Suite 654, Capital Centre
386 North Wabasha Street
Saint Paul, Minnesota 55102
Telephone: (612) 223-5175
Counsel for Petitioner

KENNETH W. STARR*
Solicitor General
Department of Justice
Washington, D.C. 20530
Telephone (202) 514-2217
Counsel for Respondent

*Counsel of Record

Petition For Certiorari Filed October 21, 1991
Certiorari Granted March 2, 1992

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

TABLE OF CONTENTS

Page

Relevant Docket Entries..... 1

Transcript of Trial Proceedings on October 12 and 13, 1988..... 7

Order of the District Court, filed October 14, 1988, Permitting Trial *In Absentia*..... 48

Opinion of the Eighth Circuit Court of Appeals, filed October 16, 1990..... 52

Amended Order of the Eighth Circuit Court of Appeals Denying Petition for Rehearing and Suggestion for Rehearing En Banc, filed May 8, 1991..... 70

Judgment *Nunc Pro Tunc* of the Eighth Circuit Court of Appeals, filed September 30, 1991..... 71

Order of the Supreme Court of the United States granting certiorari and leave to proceed in forma pauperis, March 2, 1992..... 72

RELEVANT DOCKET ENTRIES

(United States District Court, District of Minnesota)

04-20-88	INDICTMENT
06/15/88	MINUTES (JEC) INITIAL APPEAR: Deft detained. PD appt'd. Arraign set for 6-23-88 @ 2 p.m. b/4 JEC. Det hrg 6-17-88 @ 11 a.m.
	ORDER OF TEMPORARY DETENTION
06/23/88	MINUTES (JEC/tape) Detention Hrg.
06/23/88	MINUTES (JEC/tape) ARRAIGN: Plea of not guilty entered to indict.
	DEFT'S PRETRIAL MOTIONS TO/FOR:
06/29/88	Severance
06/30/88	ORDER SETTING CONDITIONS OF RELEASE
07/05/88	APPEARANCE BOND exec @ $100,000.00 surety
07/28/88	Pretrial Conference Notice – set 8/15/88 at 9:00 a.m. before DDA.
8/10/88	REPORT AND RECOMMENDATION AND ORDER
	Defendants' motions for severance of counts and defendants are DENIED;
08/15/88	MINUTES (DDA/LL) Pretrial conf: trial set 10/12/88. Witnesses are ordered sequestered. All parties to exchange exhibit lists by 9/12/88. All parties to meet re: lists 9/29/88. PTC 9/30/88. Deft Cunningham's motion for extra juror strikes – Granted.
09/12/88	Notice of Trial – October 12, 1988 @ 9:30 a.m. b/4 DDA.

09/16/88 Notice of Ex Parte motion & Ex Parte motion to withdraw.

09/19/88 ORDER (DDA) the magistrate's order of 9/10/88, is AFFIRMED. The magistrate's R & R of 8/10/88, is adopted & the motions of defts Kesler, Cheatham & Crosby to suppress are DENIED.

09/19/88 MINUTES (JMS/Beth Bettiga) Hrg on counsel's motion to withdraw. Matter submitted and motion to withdraw is denied. Transcript of these proceedings to be sealed.

09/23/88 ORDER (JMS) that the motion for withdrawl as counsel is DENIED.

09/30/88 MINUTES (DDA/LL) All gov't motions for exemplar have been granted & resolved. Order for excludable delay is granted in Mag. order of 8/10/88 (item 13) Proposed voir dire to be submitted by 10/7/88. counsel to meet on 10/4/88 @ 1 a.m. to go thru exhibit list. Court orders defense counsel to produce & furnish to gov't exhibit list by 10/6/88 & furnish copy of same to court. Doug Altman has no objection to the 10/12/88 trial date.

10/06/88 Deft's notice of motion & motion to renew motion to withdraw.

10/07/88 MINUTES (DDA/LL) Mr. Altman's requested transcripts & exhibits of this hrg sealed. GRANTED. Mr. Altman's renewed motion to withdraw as counsel is DENIED. Deft's oral request to be allowed to travel to Calif., withdrawn.

Exhibit from renewed motion of Michael Altman to withdraw as counsel on case. SEALED BY ORDER OF THE COURT

10/12/88 MINUTES (DDA/LL) No appear by deft. Prelim matters b/4 jury selection: 1) Deft Cunningham's motion to sever DENIED. 2) Deft Cunningham's renewed motions for discovery, Jencks material, exculpatory stmts – Court orders co-defts to provide material they rec'd to be examined by deft Cunningham. Court ordres [sic] Brady material on remaining defts to be furnished to counsel. Crosby's motion in Limine will not be heard until deft is present. Gov't moves for a bench warrant for deft's arrest & a 1 day continuance of trial – granted. Court orders a declaration of forfeiture hrg for 10/13/88 @ 8:30 a.m. Warrant issued.

Affidavit of Michael J. Crosby

ORDER (DDA) that a warrant be issued for the arrest of deft Crosby & that the USM undertake immediately to serve the warrant.

10/13/88 MINUTES (DDA/LL) No appear by deft Crosby. Forfeiture of bond hrg. Also attending: Mike Leverson-USM, & Mark Pagoli, Neil & Joseph Krzyzaniak, Allan (Bud) Goldberg, Bill Johnson & Glen Baskfield. Court orders Crosby's bond forfeited & to be pd by noon on 10/17/88.

DECLARATION OF FORFEITURE (DDA) that bond is ordered forfeited to the USA & the surety on the bond, Int'l Fidelity Ins Co, is ordered to pay the principal amt of the bond, to-wit $100,000.00 to the Clerk of this court on or b/4 12:00 noon on 10/17/88.

10/14/88 ORDER (DDA) that this action shall continue to trial on 10/17/88 in the absence of deft Crosby. (copies given to counsel in court)

10/17/88 Receipt #72402 in the amt of $100,000.00 for Bond Foreiture [sic] per Order dated 10/13/88, docket #51. Original copy of receipt sent to Bud Goldberg.

10/14/88 MINUTES (DDA/LL) PTC; Deft's motions for severence – DENIED; Court orders trail [sic] against Crosby to proceed in absentia. Deft Crosby's motion in Limine – taken under advisement except as to # 7 – which is denied.

10/17/88 MINUTES (DDA.LL) *1st day of trial:* Jurors impaneled.

10/28/88 TRANSCRIPT of hrg b/4 DDA on 10/7/88. This transcript contains statements of deft made to the Court during this [sic] proceedings.

11/18/88 MINUTES (DDA/LL) *Cont'd deliberations:* Jury returns w/verdict of guilty on cts 1 thru 25. Jurors excused. Exhibits retained by court. PSI ordered.

11/18/88 VERDICT

03/08/89 TRANSCRIPT of Trial commencing on 10/12/88. Vol I. [SEPARATE]

TRANSCRIPT of trial proceedings on 10/13/88. Vol II. [SEPARATE]

07/13/89 Defense counsels motion to withdraw.

07/14/89 Michael J. Crosby, consent to the withdrawl [sic] of Douglas B. Altman, Atty.

07/20/89 Affidavit of Douglas B. Altman

07/27/89 MINUTES (DDA/LL) Mr. Altman's motion to withdraw as counsel granted. Mr. Altman is withdrawn as active counsel but kept in as consulting atty. Mark Nyvold is appt'd as counsel. Sentencing cont'd for approx. 2 wks. Motion for remission of bond money – denied.

08/04/89 TRANSCRIPT of motion hrg b/4 DDA on 10/07/88. *FILED UNDER SEAL – SEE DOCKET ENTRY # 40*

08/21/89 MINUTES (DDA/LL) *SENTENCING*: 20 yrs + 5 yrs probation. Condition of probation, deft pay restitution in the amt of $550,000.00, partial list of victims attached. Special assmt of $1,250.00. Deft advised of his right to appeal his conviction.

08/28/89 NOTICE OF APPEAL by deft from Judgment entered on 08/21/89.

Cert/copies to U.S.C.A., St. Paul on 08/29/89.

01/16/90 ORDER FROM THE U.S.C.A. THAT THE GOVT'S MOTION FOR UNSEALING OF CERTAIN RECORD MATERIALS IS GRANTED. *THE DIST CT IS HEREBY ORDERED TO UNSEAL ALL RECORD MATERIALS, INCLUDING TRANSCRITPS* [sic] *& EXHIBITS PREVIOUSLY ORDERED SEALED IN THIS CASE.*

10/18/90 CERT/COPY OF OPINION OF THE U.S.C.A. (Gibson, Bright, & Fagg) REMANDING THE CASE TO DIST CT FOR FURTHER CONSIDERATION OF ITS RESTITUTION ORDER. THIS PANEL WILL RETAIN JURISDICTION OF THIS APPEAL. IF EITHER PARTY IS AGGRIEVED AFTER THE ENTRY OF THE

DIST CT'S ORDER RECONSIDERING THE RESTITUTION AWARD, WE WILL GIVE FURTHER CONSIDERATION OT [sic] THIS ISSUED ON A [sic] EXPEDITED BASIS.

12/26/90 Joint motion for amendment of sentence.

12/28/90 *AMENDED JUDGMENT & COMMITMENT ORDER* – copies dist'd Restitution reduced: $550,000.00 to $240,035.00

ORDER (DDA) pursuant to the mandate of 10/18/90, this action is resubmitted to the Court of Appeals of the 8th Circuit.

MANDATE: 89-5450

10/04/91 CERT/COPY OF OPINION OF THE USCA (Gibson, Bright & Fagg) AFFIRMING THE CONVICTION & REMANDING THE CASE TO THE DIST COURT FOR FURTHER CONSIDERATION OF ITS RESTITUTION ORDER IN LIGHT OF *HUGHEY*. 15 pgs

CERT/COPY OF JUDGMENT OF THE USCA (9/30/91) JUDGMENT OF THE DIST COURT IS AFFIRMED. THIS JUDGMENT IS ENTERED NUNC PRO TUNC TO 01/24/91, THE DATE THE APPELLANT NOTIFIED THIS COURT OF HIS AGREEMENT WITH THE DIST COURT'S AMENDED JUDGMENT & COMMITMENT ORDER (see doc #136) ENTERED AFTER HIS COURT'S OPINION OF LIMITED REMAND. THE RECORD IS HEREBY CORRECTED TO SHOW ENTRY OF JUDGMENT.

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION

----------x

UNITED STATES OF AMERICA,

Plaintiff,

VS CR 3-88-40

MICHAEL CROSBY,
JAMES A. SANNES,
MARTIN CHEATHAM,
JACK CUNNINGHAM,

(October 12, 1988)

Defendants.

----------x

[2] WHEREUPON, the following proceedings were had:

* * *

Okay, we have the case of United States versus Michael Crosby. Mr. Crosby isn't here but we can discuss matters of law with reference to voir dire and that sort of thing before he comes.

* * *

[3] THE COURT: All right. Michael Crosby represented by Douglas Altman. Mr. Altman is here, Mr. Crosby is not. What did we tell him, 9:30, is that the problem.

MR. ALTMAN: It is possible Your Honor. I talked to my client yesterday and he indicated he would be here.

THE COURT: Why my guess is we have a problem with the timing of our start.

* * *

[25] THE COURT: What can you tell us about the whereabouts of Mr. Crosby, Mr. Altman, if anything.

MR. ALTMAN: Following the hearing on Friday I received the Jencks Act material late in the afternoon Friday, arranged to make a full set of copies for Mr. Crosby. I received those Saturday afternoon and called him at about 3:30 in the afternoon advising him that I had them and that they were available to him. I got his answering machine and I didn't hear anything from him the remainder of Saturday or Sunday.

I called him yesterday morning and asked him whether he went to California and he told me he had not. I told him again of the Jencks Act material, he advised me he would be coming over in the afternoon to pick it up and there were some other [26] matters discussed in connection with my representation which I don't think I have to go into.

THE COURT: No, you don't.

MR. ALTMAN: But he gave me every indication that he was not discharging me, that I was to represent him, and he would be here this morning. I didn't talk to him again the rest of the afternoon, nor to my knowledge did he ever come to my office.

THE COURT: But he indicated he would be here?

MR. ALTMAN: Yes, sir. I can try to call him now.

THE COURT: Why don't we take a break and why don't you do that. Our jury is here, Ms. Frette?

THE CLERK: Yes.

THE COURT: How many jurors do we have.

THE CLERK: I have no idea.

THE COURT: Check and see during the break.

All of your written motions, have they all been filed – do you have the originals.

THE CLERK: I have the originals.

THE COURT: Okay. I think that is all. We obviously can't start without Mr. Crosby. We will take a 20 minute break.

* * *

[28] We are ready to go except for Mr. Crosby is that it?

MR. ALTMAN: Yes, Your Honor.

THE COURT: We will recess for 10 minutes. You might check around the hall and see if you can locate him and make [29] your phone call and if he is not here why we will issue a bench warrant and see if we can locate him.

We will recess subject to call.

RECESS TAKEN

THE COURT: Okay. Well it is 10:25 or thereabouts Mr. Altman. You have been unable to make telephone contacts with your client, is that it.

MR. ALTMAN: That is correct, Your Honor.

THE COURT: Any of you other folks know the whereabouts of Mr. Michael Crosby.

(No response).

THE COURT: All right what do you suggest Ms. Erickson.

MS. ERICKSON: I would move for the issuance of a bench warrant at this time.

THE COURT: I was going to do it on my own motion but if you want to make the motion –

MS. ERICKSON: And I don't no personally of anybody that has seen him, but I understand that some of the defendants may have seen him within the last 24 hours and so I would move for a continuance of one day to see whether we can locate the body of Mr. Crosby and bring him in here so he can stand trial with the rest of co-defendants and not impose a de facto severance on the court when the court has already denied the severance motion.

THE COURT: I have checked with the pretrial services [30] office during our break and maybe he has got some traffic problem or he is unable to get here for some good and sufficient reason. We just don't know. But Mr. Marshal have you got a pad and we will – I am going to give you some information about him.

As I understand it the government has subpoenaed all it's witnesses for either today, tomorrow or starting next week.

MS. ERICKSON: They were all subpoenaed today and notified by telephone not to show up until notified.

THE COURT: And the record may reflect that we have 52 jurors here ready to go.

THE CLERK: 54.

THE COURT: 54 jurors ready to proceed.

The information I have is that the address given for Michael Crosby, Michael J. Crosby is 7004 Gleason Road, Edina, Minnesota, 941-587 is the phone number; that his wife is a person by the name of Joleen, J-O-L-E-E-N Benoit, B-E-N-O-I-T; that his father is Joseph Krzyzaniak, K-R-Z-Y-Z-A-N-I-A-K; his mother is Pamela Krzyzaniak; same spelling; that his parent's address is 1920 West 76th street, telephone number 869-3062. That is bother, one brother is Peter Krzyzaniak of Egan, Minnesota, the address I don't have. The phone number is 454-0962. He has another brother – why don't you get that file. I guess I left the file on my desk, the Crosby clerks file. Another brother Neil Krzyzaniak at Prior Lake, 445-6376, and [31] the statement was made to the Magistrate at that time of the detention hearing that he was going to be working for one or the other of those two brothers or maybe both who are apparently in the construction business.

It is ordered that the clerks office issue a warrant for the arrest of Michael J.Crosby and that you, Mr. Marshal undertake the services of your office to see if you can

locate him and I think you should prepare a written order for a bench warrant although you may consider it as if the bench warrant has been issued and undertake to locate him and take him into custody so that we can continue with our trial.

THE MARSHAL: Okay, Your HONOR.

THE COURT: So we can start our trial more properly. Will you arrange for a written order Ms. Erickson.

MS. ERICKSON: A written bench warrant.

THE COURT: Order for bench warrant.

MS. ERICKSON: Yes, Yes.

THE COURT: So the Marshal will have something in it's possession.

Now I need the clerks file. There was a detention hearing in this case heard before the Magistrate and he was ordered to appear at the pretrial offices each morning at 9:30. I think, do you have that memory?

MS. ERICKSON: I just looked at it during the break so I no it is in there. He also furnished a one hundred thousand [32] dollar surety bond with the Goldberg Bonding Company as surety.

THE COURT: You might, Mr. Marshal, notify Mr. Goldberg's office because he sometimes can be of assistance in locating those for whom he releases or furnishes the surety. He called me – what day were we here, Mr. Altman.

MR. ALTMAN: Friday.

THE COURT: Friday last he called me that day and convinced me on the phone that he did not intend to go to California but intended to get those records by way of a telephone conference with somebody out in California and I made a note of that, I think in the file, or you did, Sheri, a minute entry, and at the hearing on Friday he told us that it was his – ,his father's house I think that was serving as security for the bond.

Well why don't you folks, as sometimes is said, be attendant to the court and if he arrives we will start, if he doesn't we will wait and make a judgment as to what successes we have in locating him.

All right, Mr. Marshal, we will just wait and see what we can see during the course of the day. My sense is that we will wait surely until the end of the day and then we will make a decision at the end of the day whether we are going to – what we will do after we get further information from the Marshal's Office.

MR. ENGH: Does the court wish us to stay in St. Paul.

[33] THE COURT: Yes, I want you to stay right here until we find out what we are going to be doing. You meet with Ms. Erickson and get the additional materials and go through exhibits or do whatever else you can do to occupy your time but, yes, I want you to stay, and I want you and your clients to stay here in St. Paul.

All right we will stand in recess.

RECESS TAKEN.

(In chambers out of hearing of the jury)

THE COURT: We are in chambers with counsel to discuss scheduling and matters of law only without the clients.

It is now 12 o'clock and I have just checked with the Marshal's office, they have the warrant for Mr. Crosby's apprehension but they have no information for me as to his whereabouts. I have the jury coming back at 1:30. None of you have any additional information I take it as to – you have not heard from him. Mr. Altman.

MR. ALTMAN: No, Your Honor.

THE COURT: Which gives us some decisions to make as to how we are going to proceed.

The first thing I want to do is to reconvene at 1:30, quarter to two, to see if we have any information. I have asked the Marshal's office to let me no if they hear anything. He hasn't called your office Sheri?

THE CLERK: No, not that I know of.

[34] THE COURT: We don't have any message from anybody?

THE CLERK: No.

THE COURT: My plan would be I guess to postpone the trial until tomorrow or alternatively until Monday. I would like to think about whether I can or can not proceed in his absence. Have you thought about that?

MS. ERICKSON: Yes I have, Your Honor.

THE COURT: Under the current circumstances I am satisfied I can not, until I have more information as

to his whereabouts. He could be in a hospital for all I know.

MS. ERICKSON: The court is satisfied that he knew about the trial date and actually failed to appear. The Supreme Court cases that I have been able to find would permit us to proceed against him in his absence and the cases that I have are from about 1971 – 1975 and I have a law clerk downstairs updating that research right now.

The rule appears to require that the defendant be there at the beginning of the trial and that you proceed if he takes off and that is usually the way it happens. But the cases indicate that you can proceed against him in his absence even if he is not there at the outset of the trial and particularly in a multi-defendant case like this.

THE COURT: Well, we will be doing some research. I am not going to do anything until Monday, we have Friday, we didn't plan to work anyway.

* * *

[35] THE COURT: You haven't done any research Mr. Altman about proceeding in the absence of your client.

MR. ALTMAN: I have done a very little bit, Your Honor. For the record I would object to any proceedings in absentia.

THE COURT: Right. Well I am not going to make any judgment about that until Monday at the earliest in any event and that would give us four days to do research and, B, try to locate him. But you have your people working on cases?

MS. ERICKSON: Yup. I have an order for a bench warrant which is now lost in the middle of our computer.

THE COURT: I have already signed the bench warrant. If [36] you want to give me an order I will be glad to –

MS. ERICKSON: As soon as it will come out of the computer.

THE COURT: I ordered it off the bench so I am satisfied it is a proper warrant and I signed the warrant and it is in the custody – in the hands of the marshal. I don't know where they would start looking for Mr. Crosby to tell you the truth.

MS. ERICKSON: I think he hid at Tamara Kesler's house once before but we talked to her and she claims not to know where he is.

THE COURT: Like today?

MS. ERICKSON: I talked to his brother Philip Paul, he doesn't know where he is.

THE COURT: There were two brothers that appeared apparently at his detention hearing that avowed that they would let him work for them or some such thing. He was supposed to report in every day, that was a reporting requirement you were aware of?

MS. ERICKSON: All I knew is that my detention order had been – my detention motion had been denied and I assumed there were some pretty restrictive conditions on his release.

MR. ALTMAN: He had a daily reporting requirement.

THE COURT: In person to the –

MR. ALTMAN: That is right.

[37] THE COURT: To the pretrial detention office.

MR. ALTMAN: That is right and except for one minor glitch very early on he reported faithfully.

THE COURT: Of course Monday was a holiday so nobody was there so he probably didn't report to anybody on Monday.

Did you talk to Bud Goldberg?

MS. ERICKSON: I have not talked to Bud Goldberg.

THE COURT: You didn't talk to him either.

THE CLERK: You asked the marshal to do that.

THE COURT: Did I tell the marshal to talk to him? Goldberg sometimes can find people that nobody else can.

Okay I will see you at 1:30.

RECESS TAKEN

THE COURT: We are in chambers with counsel without the parties to discuss the current problem in the absence of Mr. Crosby and we have a marshal enroute who is going to give us an oral report as to the efforts of the Marshal's up to this point in time.

I can tell you that I talked to Mr. Goldberg, I did tell the marshal to talk to him, I had forgotten.

THE CLERK: Yes, you did.

THE COURT: Nobody had talked to him but I called him before noon and he was going to undertake to try to locate Mr. Crosby in as much as he is his bondsman, and he said he would report back to me this afternoon, let me know what he finds out [38] and the marshal will tell you momentarily I hope what he has found out.

Have you decided what you would like to do by way of trial or have you discussed that amongst yourselves or what, with your clients?

MR. HAWKINS: I guess for me, Your Honor, my preference would be to pass the matter until Monday morning a [sic] at 9:00 o'clock. But that is because of the situation that arose out of yesterday. I have got Copywright Printing, xeroxing I think as we speak, all of Mr. Engh's Jencks material, and I would like to do it on Monday just because it is going to give me a cushion, you know a handle – to go to do it, go ahead for trial on Monday.

MR. ENGH: On behalf of Mr. Cheatham –

THE COURT: You understand you don't have to make a final judgment we are not going to do anything until Monday.

MR. ENGH: We would like to see Mr. Crosby here for trial.

MS. ERICKSON: That is unanimous.

MR. ENGH: Really we want him here for strategic purposes.

THE COURT: Suppose we can't find him. Obviously we all would like to have him here except for perhaps – we all would like to have him here.

These are all the attorneys in the case. I thought [39] maybe you could just, with Mr. Lindberg present, give us a little report as to the information that has come to your attention since you have been commissioned to locate Mr. Crosby. Do you want to have a chair? Here is one right here. Catch the door there, Christy.

MR. HAWKINS: Or you can sit with us.

THE MARSHAL: Two deputies went to the Crosby residence, no one was home. They looked in the windows. The place looked like it is cleaned out. They are waiting for the landlord to come to let them in to search the place. His wife isn't home, she is an entertainer and they don't know exactly how to get in touch with her.

The neighbors saw him last night, he backed the Cadillac into the garage, just halfway into the garage which gave them the impression that he was doing something with the trunk, maybe packing, and that is all the information we have right now.

THE COURT: All right. In other words they were not able to locate him up to this point in time.

THE MARSHAL: Right, and it looks like they are not going to very soon, here in Minnesota.

THE COURT: You are going to check with his parents and his brothers perhaps.

THE MARSHAL: Well, we haven't at is [sic] this point.

THE COURT: No. I should tell you that I contacted Mr. [40] Bud Goldberg, he is the bondsman and sometimes he has been helpful in locating folks when they are not available to us.

There is a one hundred thousand dollar bond outstanding on Mr. Crosby. My present plan is to conduct a bond hearing tomorrow morning at 8:30 and I will so advise Mr. Goldberg and he will so advise the sureties on the bond and what we are going to do is kind of postpone the trial on a day by day basis at least until Monday. We wouldn't work on Friday in any event. So the lawyers are going to be available this afternoon and maybe we could have a little report at the end of the day if you have any other information or developments you could let us no [sic], and then we will kind of keep you posted as to what our plans are on this end. We have not made any judgment yet as to whether the case can go forward without him or should be postponed or exactly what we should do. No final decision will be made until Monday of next week.

THE MARSHAL: Okay.

THE COURT: But we are anxious to find him if he is in the State of Minnesota.

THE MARSHAL: We will find him if he is in the State of Minnesota. How does that sound?

THE COURT: That sounds great. Even if he is in the United States.

THE MARSHAL: Sounds good to me.

THE COURT: Thank you ma'am marshal for coming up. Now [41] that is as much as I know.

We are trying to get another case in. I have a couple of cases that could be tried in a day and a half, two days.

Well have you thought about – you don't have to tell me if you have decided, but have you thought about going ahead with him, without him, grant the severance that you apparently want? I guess those are some of the options, or else continuing the case for awhile to see if we can locate him.

I don't know what the speedy trial impact is on you [sic] other co-defendants, that is something we have to research and try to figure out. But, what have you thought about it.

MR. ENGH: Well if at all possible we would like him here. I know I am stating the obvious –

THE COURT: We would like him here too. If he is here we will go to trial, if he is not here then we have got to go to plan, "B," or maybe even plan can [sic], "C,".

MR. ENGH: It seems you have two options. You could postpone it a little bit but of course I think we all have scheduling problems, we kind of blotted off a month.

THE COURT: We all did, including Joan and her witnesses and all of you folks and me and the whole world.

MR. ENGH: I would have to consult more with Mr. Cheatham, but our preference still would be if he is

not here, if he is not here Monday, delay it another week. We would like him here.

[42] THE COURT: How about for Mr. Cunningham, have you thought – maybe haven't thought it through or have you? Don't decide them if you don't have to is Lindberg's rule.

MR. HAWKINS: Our basis for severance was in an effort to be able to have him testify.

THE COURT: Yeah this is true on the theory that he would help you.

MR. HAWKINS: On the theory he would help us. I have a separate theory if he is going to be jointly tried and won't testify.

THE COURT: Well the decision would be – the options would be continue the case until we find him or at least for a reasonable time until we find him.

MR. HAWKINS: I guess right now, based upon the courts ruling this morning, I would join Mr. Engh's suggestion in continuing the case until Monday, get a status on Monday and try and go on a short term basis to determine whether or not they can seize him whether it be in Chicago, Detroit, New York City or in Montreal, I don't know, and bring him back within a reasonable period of time, to go to trial based upon the rulings that the court made this morning.

THE COURT: Well Mr. Sessoms what do you say?

MR. SESSOMS: Well again my motion for severance was based on his potential availability as a witness.

I am inclined to want to have the case postponed until [43] he is apprehended. As long as it is a reasonable length of time.

THE COURT: All of you will have to talk to your clients about the implications of the speedy trial act. I frankly don't have any idea what it does – if they are willing to waive it until we find him that is one thing. If they are not, that is something else again; whether or not the absence of the principal defendant does or does not stay the proceedings, constitute excludable type delay, I don't have the foggiest idea.

MR. SESSOMS: I already talked to my client about that on various other occasions and I am sure that he will again indicate that he is out on bond and he is available and he wouldn't have any problem with waving his right to speedy trial.

THE COURT: What say you Ms. Erickson?

MS. ERICKSON: Well –

THE COURT: It ain't pretty, and of them.

MS. ERICKSON: No. they are bad. I second and third Mr. Engh's position that we would prefer to go to trial with Mr. Crosby personally present. His culpability is so much greater than the other defendants and the expense to the government is just tremendous. I mean I can't say it is not worth it for the other defendants but it is really worth it for Crosby. It is really worth it for Crosby and we are talking about victim witnesses I should say that are very, very old, 93, and blind. [44] We had one guy chop off his hand or two fingers off his hand

this morning. They are falling. I don't know how much longer they will be around.

So we have an interest in trying it as soon as possible. If we do try it earlier – well by earlier I mean maybe next week. I would really like to try Mr. Crosby in absentia. I don't know how we can try it twice.

A lot of these people are coming from Texas, coming from all over. I don't know that we could get them here twice.

THE COURT: You had better look up some law if that is what you are are – That is what you are doing I guess.

Why don't you do that and give us any cases that you have got, would you, or give them to all of us, these other folks too.

MS. ERICKSON: I have a set of cases. I don't have them with me.

THE COURT: Why don't you have somebody pound them out, give a copy to all these folks and give a copy to us. We don't have to decide anything right now but obviously it sets all of us in an up side down turmoil.

Why don't you just wait around until 4:00 o'clock, 4:30 and we will hopefully get another report from the marshal. I am going to call Goldberg and schedule a bond hearing tomorrow morning at 8:30. I don't know what I can do under those circumstances but I want Goldberg and the bonding – and [45] sureties on that bond here present at least. At least I would think they would want to be present. We may do a little checking on that too, whatever options there are, but I think I am entitled to

revoke the bond if I chose to, if I am satisfied he has become a fugitive. I am not going to waste any time doing so if that is the option that is available to me, you had better come to that, Mr. Altman.

MS. ERICKSON: I will come then and make a motion.

MR. ENGH: I take it the others defendant don't have to be at the bond hearing?

THE COURT: No, but if he is apprehended or shows up or walks in the court house I want to be ready to go. The problem is when do I tell 54 jurors to come back, that is the problem I have got.

MR. HAWKINS: My suggestion would be, Judge, based upon what the marshal told us, it is a reasonable assumption in my opinion that he was putting something in the trunk of his Cadillac last night for a reason and the reason probably being that he has absconded.

That being the case and Friday being a day of recess, it doesn't make a whole lot of sense unless you have another case to bring a bunch of jurors in – I rode up – the reason I say this, I rode up with some of the jurors who I believe were some of the jurors on the elevator this afternoon and they were talking about whether or not they are going to sit around [46] all afternoon again or get down to business.

THE COURT: They are madder than hell and I can guess – and I don't blame them and I can't tell them why we are not trying the case.

MR. HAWKINS: I would hate to have them come in tomorrow morning and be again sitting around all day.

THE COURT: I would hate to have to pay to have them come in tomorrow morning and sit around all day waiting for Crosby.

Maybe the thing to do would be to have them come back on Monday. I don't have any guarantee I will have him here Monday. What I am trying to do is get another case. I am trying to get one as late as this afternoon. If you think it is any fun for me to call in 52 jurors and tell them to go home again – do you have those case cases on trying him in absentia?

THE CLERK: Yes.

THE COURT: Why don't you go in and call Arlene Stassen and ask her to come down. Why don't you give these cases to your colleagues and give them to us. We are not going to decide it now, we may decide it on Monday or Friday as far as that goes.

My sense is we gather at 4:30, we can have the jurors call the code-a-phone tonight I suppose –

THE CLERK: Sure.

THE COURT: – if we don't have any definitive [47] information.

Has that Wilson guy called you.

THE CLERK: No.

THE COURT: Any of the guys know Wilson from St. Paul.

MR. HAWKINS: Tom Wilson?

THE COURT: Larry says he was in court with his client but we couldn't find him.

MR. ENGH: I saw him this morning.

THE COURT: Do you want to give Ms. Stassen a chair there.

We tried to keep you posted on an hourly basis down there.

MS. STASSEN: Sure, I believe you.

THE COURT: The last information we have ma'am jury clerk is that one of our – who appears to be our principal defendant, is not at his residence. The marshal reports that his residence appears to have been – to have some things removed or maybe everything removed. We are not quite sure. That last evening his Cadillac automobile was seen backed into the garage with the trunk open in what may have been an effort to pack up or do some such thing and we are not now aware of his whereabouts. You have 52 jurors down there going crazy I suppose.

My sense is that we might as well excuse them and if he doesn't come in this afternoon we are going to wait until [48] Monday. At the same time we will be trying to get another case in. If we could get one in this afternoon we will start trial, if we could get ahold of the lawyers.

They are really hard to get ahold of, I know.

Sheri try that Wilson one more time, go call him.

MS. ERICKSON: I thought that was possession of stolen mail.

THE COURT: That is the one, we are trying to get, either one. I have two cases I could work in between now and Monday but I have to try to work with the jury to solve that problem. You have problems with witnesses I have problems with jurors.

MS. STASSEN: Judge Devitt will start a trial Monday afternoon. I am going to have jurors for him for Monday afternoon. Magnuson was, but his went away this morning so I already have jurors coming for Monday, but some of them were going to be left over from this.

THE COURT: Yeah. Devitt is not starting until the afternoon. If I start at 9:00 o'clock I could get a jury picked by afternoon for Devitt so you could have the left overs, but what I was thinking is there – could we have these folks call in tonight about tomorrow.

MS. STASSEN: Um-hum.

THE COURT: My sense is we are not going to find this man between now and the close of business today.

[49] MS. STASSEN: How much can I tell those people?

THE COURT: That is the problem you can't tell them we can't try the – what I am going to have them do is go in the courtroom.

MS. STASSEN: They are in Judge Devitt's courtroom right now because the naturalization ceremonies are going on and they have coffee in the jury room.

THE COURT: What I want to do, go in and tell them we can't try, we can't proceed with our trial today for reasons that I am not at liberty to disclose to them but assure them that it is – well that is all I can tell them I guess, and tell them we are trying to work around the scheduling problem that we have and is that what you want to do, tell them that they should call in tonight – the options would be come in tomorrow or do you have them by letters A through –

MS. STASSEN: L and M – they are panels L and M.

THE COURT: If I could get another case in tomorrow where I don't need 52, all I need is 30ish.

MS. STASSEN: That would be okay, being I think we are going to lose a few out of this bunch.

THE COURT: I have been trying to get another case in all day and I can't get a hold of the lawyer.

MS. STASSEN: If you go in I will go with you, we will take my list and we will find out who absolutely can not come.

THE COURT: You can do this after I leave. I just [50] want to excuse them. Tell them we have a problem I can't tell them about, and that is all I can tell them.

What you want for tomorrow is criminal, is that correct?

MS. STASSEN: Yeah.

THE COURT: All I have is a criminal, I am on a criminal roll, I can't get two of them and then I am trying

to go to Duluth too. This is really screwed up, its screwing everybody up and these defense guys and you and everybody.

MS. ERICKSON: You have know [sic] idea how hard it was to schedule General Yeager.

THE COURT: I have sold the popcorn concession out for him too, I have a lots of folks that will be disappointed.

MR. HAWKINS: My agent gets the autograph, right.

THE COURT: I only have two weeks before Duluth, there is no way we can finish.

MS. ERICKSON: Does anybody here care I am getting married December 10.

MR. HAWKINS: I do.

THE COURT: Is that at St. Olaf?

MS. ERICKSON: Carlton.

THE COURT: Where is Carlton located do they have a college?

MS. ERICKSON: Yeah, but they got a couple of good ones down there.

[51] THE CLERK: I couldn't get a hold of anybody.

THE COURT: Off the record.

(Off the record discussion held)

THE COURT: Now we are all in the courtroom, clients, lawyers and the like. Ma'am marshal do you want to give us a little – any further information you have as to the whereabouts of Mr. Michael Crosby.

THE MARSHAL: Your Honor, as of this time we have not located Mr. Crosby and I don't have any update on how the investigation is going.

THE COURT: It is just on going in an effort to try to locate him.

THE MARSHAL: Yes, Your Honor.

THE COURT: Okay thank you.

I should tell counsel that I have been in contact with the bonding company that furnished the bond on behalf of Mr. Crosby and I have scheduled a bond revocation – bond forfeiture hearing for tomorrow morning at 8:30 and I have so advised the bonding company and he in turn representatives of the bonding company. He advised me that he will notify the guarantors of the bond namely a Mr. Joseph Krzyzaniak and a Mr. Neil Krzyzaniak and the Wood Bridge Ponds Development people and advised them that they would be well advised to be here present tomorrow for that purpose.

Mr. Altman I think you should be here please.

[52] MR. ALTMAN: Yes, Your Honor.

THE COURT: So I guess our trial will be continued on a day-to-day basis and my sense is that we will not start trial tomorrow under any circumstance but simply because I can't get 54 jurors, I am not disposed to ask 54 jurors to come back although I full well intend to

reimburse the government for the expenses incurred in bringing in the jury absent some extraordinary circumstance with reference to Mr. Crosby that I am not now familiar with.

So my suggestion is that we continue the case until Monday. Now do you have any additional law that you want to furnish to me Ms. Erickson with reference to continuing a trial in absentia or have the cases you have given us exhausted your efforts at research in that regard too?

MS. ERICKSON: The court and defense counsel have all the cases I have up to this point and we will continue to research the matter but that is all we have done since the last time we met.

THE COURT: It is your sense based on your research that the attorney for Mr. Altman (sic) stays and participates or doesn't stay and participate?

MS. ERICKSON: I haven't looked at that. The only case I know of where the defendants where tried in absentia was it was part of the Craigness (ph) –

THE COURT: I am sorry part of what?

[53] MS. ERICKSON: Some of the Craigness (ph) defendants, it was a RICO case that we tried in front of Judge Devitt and some of the Defendants were severed and sent out to Maryland and fled. They were tried in absentia and I believe their attorneys went ahead and represented them even though they weren't there and that is my only experience on that.

THE COURT: Do you have any thoughts or law on the subject Mr. Altman.

MR. ALTMAN: Your Honor I will be opposing a trial in absentia but just based upon what I have read it appears that if a trial goes forward on that basis that defense counsel continue in the case.

THE COURT: Just continue on as if it is – if the defendant were present.

MR. ALTMAN: That is correct.

THE COURT: All right do any of you have any cases that you want me to be attentive to with reference to trial in absentia other than those that the government has furnished to us.

(No response).

THE COURT: We will take a look at your cases.

I would be appreciative if you attorneys would make yourselves available by phone at least so we know where to reach you. We are having a lot of difficulty in trying to schedule a case for tomorrow but what I may do after I have had a chance to [54] look at those cases tomorrow is to get you in here on Friday at least for half an hour or so to discuss the issue of whether we go ahead on Monday or not with our trial, assuming that Mr. Crosby is not available, then we would still go ahead with the trial.

That is the position of the government, the government is going to be urging the court to go forward in any event?

MS. ERICKSON: Yes, it is.

THE COURT: And that Mr. Altman would be opposing. And as to the other defendants, I don't know if

you have a position in that regard or not. Obviously you would all like to have him here.

MR. ENGH: Our position on behalf of Mr. Cheatham is that we would prefer Mr. Crosby is here and if he is not here we would ask for a continuance until he is arrested. I say that on behalf of Mr. Cheatham after consulting with him about the complexity of the situation and also his right to a speedy trial.

THE COURT: I am sorry I didn't hear the last part.

MR. ENGH: We would be willing to waive his speedy trail claim in order to have Mr. Crosby here. That seems to be one of the side issues in all of this, if the court does delay it, but Mr. Cheatham would be willing to waive his right to a speedy trial.

THE COURT: All right and Mr. Hawkins?

[55] MR. HAWKINS: Your Honor, Mr. Cunningham's position or defendant Cunningham's position is we would like Mr. Crosby here. Further Mr. Cunningham has once filed a motion for a continuance and excludable delay and is willing to waive his right at this time also to a speedy trial so Mr. Crosby could be present.

THE COURT: All right. Mr. Sessoms do you have a position yet or are you still developing a position.

MR. SESSOMS: No, Your Honor, our position is the same as the other defendants.

THE COURT: You would oppose going forward without the defendant Crosby here present.

MR. SESSOMS: Yes we would be asking for a continuance as well.

THE COURT: And would agree to waive your speedy trial rights.

MR. SESSOMS: Yes, sir, Your Honor.

THE COURT: You other defendants are welcome to be present here tomorrow morning at 8:30 you are not required to be here but if you would like to be here I want you to feel free to come and learn whatever it is there is to learn about our efforts to to locate him or the efforts of the bonding company to locate him. I can tell you that the bonding company has their own investigation on going in an effort to locate him. Have they been in contact with you to.

[56] THE MARSHAL: No, Your Honor, but they might have been in contact with Minneapolis where the main investigation is being conducted.

THE COURT: They also have been in contact with our pretrial service people.

All right we will continue the case until at least Monday and you will be in touch with Ms. Frette or I with you folks to let you know of any developments occurring on our end and Mr. Altman I will see you at. 8:30 tomorrow morning.

MR. ALTMAN: Yes, Your Honor.

THE COURT: All right, thank you.

(whereupon the proceedings came to a close)

* * *

[Trial proceedings on October 13, 1988]

[58] WHEREUPON, the following proceedings were had:

THE COURT: Good afternoon. I – maybe we had better take a roll first. United States of America by –

MS. ERICKSON: Joan Erickson, United States Attorney.

THE COURT: That is Mr. Callinan with you.

MR. CALLINAN: Yes it is, Your Honor.

THE COURT: And Mr. Altman here for Mr. Michael Crosby. Do you have any additional word about Mr. Crosby, Mr. Altman, to pass on.

MR. ALTMAN: No, Your Honor.

THE COURT: All right. Mr. Sessoms is here for Mr. Sannes, both present.

MR. SESSOMS: Yes, Your Honor.

THE COURT: Mr. Hawkins is here with Mr. Cunningham, both present.

MR. HAWKINS: Correct, Your Honor.

THE COURT: Mr. Engh is here with Mr. Cheatham, both present.

MR. ENGH: That is right.

THE COURT: All right. Also we have marshall Leiverson and, Mr. Marshal, if you would step forward

and give us any additional information or lack thereof that you can tell us about Mr. Michael Crosby I would be grateful. You are still under oath for purposes of this proceedings.

MR. LEIVERSON: Yes, Your Honor. At the present time, [59] Your Honor, have no further information on the where abouts of Mr. Crosby. I spoke with his wife again today and she has not be in contact with him. She has no knowledge where he might be. At this time we are still pursuing leads that we have. Nothing as yet has come up with anything.

THE COURT: You are unable to locate his vehicle either?

MR. LEIVERSON: We have not come up with his vehicle, Your Honor. She provided information for the blue MG Midget that belongs to her. The Mercedes she has no knowledge of where it was leased from or where it could be and she knows that he also has a white Cadillac but she has no idea where that vehicle is either.

THE COURT: All right. Anybody else here present have any information about Mr. Crosby's whereabouts. I hear no response.

Since our last meeting I have gone to the books as they say and I have reviewed a number of cases, the same cases you folks I am sure have been reviewing. The principal case seems to be a case entitled United States versus Tortora at 464 F2d 1202, Second Circuit, 1972; it makes reference in that case to a Supreme Court case, I don't have the opinion here with me now. I also read some cases from the Fifth Circuit as I remember; another

case from the Second Circuit was United States versus Sanchez (ph) 790 F2d, I can't read my writing, 240 or 245. I [60] read the Fifth Circuit cases of United States versus Benavides, 596 F2d 137, a 1979 Fifth Circuit case and the United States versus Beltran (ph) 516 F2d 287, Fifth Circuit case, 1983, both, – both of which cases I think the Judge went ahead and tried the case in absentia, the trial Judge, and was reversed by circumstances that I am satisfied are completely different than the circumstances in this case.

I have made a judgment that the proper way to proceed with the trial of this case, after the making of appropriate findings, is to proceed to trial in the absence of Mr. Crosby as to all defendants including Mr. Crosby. The alternatives to that are so horrendous from my standpoint and from your standpoint and the standpoint of the government and the witnesses that I think they are unacceptable and I am going to make the requisite findings, I will make them in writing, but I have prepared them now and will recite them for the record at this time. They will be findings of fact.

I had prepared them not knowing exactly what report I would get from the marshal but the marshal just confirms the absence of Mr. Crosby unexplained.

The governments position is, if you want to state your position, that is you want to go ahead as I understand it?

MS. ERICKSON: Yes. The government now formally moves to try Mr. Crosby in absentia beginning Monday, if possible.

THE COURT: And all other defendants. Now do you [61] folks want to state your positions for the record.

MR. ALTMAN: On behalf of Mr. Crosby we would oppose the motion, Your Honor.

THE COURT: All right, anybody else?

MR. ENGH: On behalf of Mr. Cheatham we oppose the motion. We suggested in chambers that the court perhaps kick the case over another week to allow the authorities a chance to find Mr. Crosby. Our position is that we prefer to have Mr. Crosby here and we would waive any right to a speedy trial. We do object to the court's decision for the record.

THE COURT: All right. Anybody else?

MR. SESSOMS: On behalf of Mr. Sannes we have the same position as Mr. Cheatham. We would object to Mr. Crosby being tried in absentia because we would like the opportunity to see if we can he can be found in order that he might provide exculpatory information on behalf of Mr. Sannes.

THE COURT: All right.

MR. HAWKINS: Your Honor, on behalf of defendant Cunningham, we would object and also move to have the matter continued in an effort to attempt to locate Mr. Crosby. In doing so I would renew my motion for severance from Mr. Crosby on the ground being tried with Mr. Crosby in absentia is even more prejudicial than having him being tried together with Mr. Cunningham if he were personally present. I think the inference that there is no question that criminal activity is afoot when

[62] an individual flees is going to spill over on to Mr. Cunningham and deny him a right to a fair trial in the absence of Mr. Crosby.

THE COURT: All right. The motion for severance is denied.

We will talk a little bit about how we will handle his absence from the standpoint of fleeing. I don't intent to get into fleeing, I just intend during the trial, and we can talk about that if you would like, we are just going to go ahead and he is not here and it will be obvious to everybody he is not here but the reasons why he is not here, or the fact that he was supposed to be here and isn't here, or any of that, I don't intend to get into, and keep that in mind.

But at the same time, to the Marshal's who are here present, the fact that we are going to go ahead should not deter you in your efforts to locate Mr. Crosby and indeed I would hope that you would continue with your good efforts in that regard, you and the other members of the Marshal's office, whatever else is available to you to try to locate him; and the fact that we go ahead is not to be indicating that we are not still trying to locate him.

MR. HAWKINS: Your Honor in that regard it appears from the newspaper article yesterday that his lack of presence hear is going to be known to the jurors. It is implicit or explicit based upon the articles of the paper.

[63] THE COURT: We will have to make inquiry of the jurors of what they read. The last thing the jury clerk told the jurors on Wednesday was that they were not to, and they were instructed not to read or listen to

any news accounts with reference to matters in the United States District Court.

Now to the extent to which they did or did not follow that admonition I have nc way of knowing. But we will have to find that out on voir dire. If it becomes obvious during voir dire that we can't get a jury – obviously I am not excited about the publicity that Mr. Crosby has brought to the beginning of our trial, but that is the way the world works and we don't live in a perfect world and we will try to proceed. If it becomes obvious that we can't, the fact that they have read it I don't think makes it impossible for us, indeed some of the stories I saw were exculpatory of your client, told about what Crosby was going to testify, so it is a mixed bag.

We are in a situation that none of us like to be in, you, me, the government, any of us. But we are in this situation because one of the defendants has left the area.

Well, based upon the record that has been made in this case up to this point in time the court makes the following findings of fact:

One: – and I can give you a copy of this Larry – the defendant Michael J. Crosby had complete, full and adequate notice of the charges and proceedings against him in this action [64] and had complete, full, and adequate notice of a scheduled trial date of October 12, 1988 at 9:30am.

In that regard at a pretrial conference on August 15, 1988, at which the defendant Crosby was present, the court advised counsel and all parties of the trial setting of October 12, 1988.

On September 12, 1988 the office of the clerk sent to all counsel a notice of jury trial advising all parties through their counsel that the action had been set for trial in St. Paul, Minnesota, on Wednesday, October 12, 1988, at 9:30 am.

On September 30, 1988 at a pretrial conference at which all counsel and all parties except the defendant Tamara M. Kesler were present, the court again notified the parties and their attorneys of the trial date of October 12, 1988.

At that pretrial conference and in the presence of defendant Crosby, his counsel Douglas Altman advised the court that he had no objection to the October 12, 1988 trial setting.

At a hearing conducted on October 7, 1988 on various motions made by the defendant Michael J. Crosby through is counsel, the trial setting of October 12, 1988 was again referred to by the court and counsel.

Two: Three co-defendants, Martin Cheatham, James Sannes, and Jack Cunningham and their counsel appeared and stood ready to begin trial on October 12, 1988 after a denial of their motion for severance.

[65] Three: on October 12, 1988 the defendant Michael J. Crosby failed to appear for trial. On that date the court ordered and executed a warrant calling for the apprehension of Michael J. Crosby. At that time and place all counsel, all other parties, the Judge, all court personnel, and 54 jurors were present and ready to commence trial of the action.

Four: The office of the United States Marshal has advised the court and counsel that in attempting to execute the warrant they were unable to locate the defendant Crosby at his place of residence in the District of Minnesota. A search of his residence by the Marshal's would indicate that the residence has been abandoned by the defendant Crosby.

Additionally, the court at this time has been further advised that notwithstanding a 5 day or 4 day postponement of the trial until Monday, October 17, the Marshal's service remains unable to locate or apprehend the defendant Michael J. Crosby.

Five: The court has, pursuant to 18 USC 3146 (d) declared a forfeiture of the one hundred thousand dollar recognizance bond filed by the defendant Crosby, all pursuant to a hearing conducted in open court on October 13, 1988 at which time there were present counsel for the government, counsel for the defendant, Mr. Allan G. Goldberg representative of the International Fidelity Insurance Company; *and the defendant's* father Joseph Krzyzaniak and bother Neil Krzyzaniak, both of [66] whom assisted in arraigning for the bond filed on behalf of defendant Crosby.

Six: none of the parties present at the hearing for forfeiture on October 13, 1988, were able to provide any information to the court as to the defendant's whereabouts nor are any of the parties present here today, October 14, 1988, able to provide any such information.

The defendant Crosby has deliberately, voluntarily, and knowingly, and without justification, failed to be

present at the designated time and place for the trial of of the action.

Eight: No evidence has been presented to the court as to the defendant's present whereabouts and there is no reasonable probability that the defendant could be located shortly, or that the trial can be rescheduled with the defendant Crosby in attendance.

Nine: The rescheduling of this trial would present extreme difficulty to the government, to the witnesses for the government, the defense counsel, and to the court.

Ten: The possibility of having to undertake two trials of this action would impose a substantial burden upon the government, on the witnesses from the government, and on the court.

The government has listed 83 potential witnesses and in excess of 100 proposed exhibits for trial of this action.

Eleven: The conduct of more than one trial in this [67] action would place an undue burden on the multitude of witnesses proposed to be called by the government, many of whom are elderly or infirm.

Upon the foregoing facts the court makes the following conclusion of law:

First: The defendant Michael J. Crosby has voluntarily waived is constitutional right to be present during the trial of this action.

Second: The public interest in proceeding with a trial of this action in absence of the defendant Michael J. Crosby outweighs the interest of the defendant Crosby to be present during the conduct of the trial of this action.

Upon the foregoing it is ordered that the above action continue to trial on October 12, in the absence of defendant Michael J. Crosby.

That order will be signed by the court today and filed and I think is consistent with the law as I understand it to be and we will start the trial on Monday in his absence.

My sense is that we will proceed much as we intended to. It is going to be a situation where the absence of Mr. Crosby is going to be obvious and yet there will be no reference to the fact that he has fled or is under a warrant for his arrest or whatever. The fact of the matter is we are simply going to go ahead and try it without a defendant present and I don't want the government to make any reference to that and I [68] don't want the defense counsel to make any reference to that, certainly without making some kind of a showing in chambers or in camera that that is relevant to our inquiry.

* * *

MS.ENGH: Your Honor, your ruling regarding the fleeing.

THE COURT: I am sorry.

MR. ENGH: Whether or not Mr. Crosby fled, you made a ruling before trial started on whether or not defense counsel can inquire as to why he left or the fact that he did flee and I would take exception to the court on that. It may we will be that the defense strategy in this case, we may wish to mention that Mr. Crosby didn't – did indeed flee on the charges and may [69] well indeed want to mention that Mr. Crosby stiffed his own family.

THE COURT: I am not quite hearing you.

MR. ENGH: It seems to me maybe the court is premature in making that ruling. I sense that on behalf of Mr. Cheatham I may want to bring out the fact that Mr. Crosby stiffed his own family. I think that the government surely can anticipate the argument you can make with a defendant who stiffs his own father –

THE COURT: I am not going to get into stiffing his own father in this trial. It may be the fact that he fled may have something to do with it.

MR. ENGH: I would certainly want to explore that.

THE COURT: You may.

MR. ENGH: I was concerned that your ruling precluded that.

THE COURT: I say what I would like you to understand is I don't want anybody to make any reference to it without making some showing in camera at the bench, in chambers or however; rather than just blurting it out, "on by the way where is Mr. Crosby, now that he didn't show up last Monday", whatever. If you want to present some evidence about that, and the government may, I don't know, but before anybody does I say let's sit down and talk about the impact of it.

MR. ENGH: I think we are going to make an effort to do [70] that.

THE COURT: Just show that he didn't show up?

MR. ALTMAN: Your Honor for the record I think any statement either by the government or by co-

defense counsel in connection with flight would be improper and I would oppose it.

THE COURT: If you want to give me some law as to the admissibility of it we will deal with it when it comes up. All I am asking is we not blurt it out without talking about it in advance. All right did you have anything more you wanted to say.

MS. ERICKSON: Just on the same point, since we are not going to discuss it now or straighten it out now there is no reason to cite any cases. I did have a case Sanchez (ph) which was also cited by the court for the proposition that evidence of flight can be admitted when the person hasn't shown up for trial and –

THE COURT: In one of those cases the Judge instructed the jury about the effect of flight and my sense is, my present sense is that I don't think I want to do that. But I haven't made any final conclusion about it. This is a new experience for me and I assume it is for all of you folks too.

MS. ERICKSON: It is new for us.

THE COURT: But I do have a lot of new things every day so I don't know. But, yes, there is an instruction that evidence of flight is evidence of guilt but let's take one day [71] at a time and let's not talk about it in the presence of the jury. Let's get our jury picked and see if we can't get this trial started. That is my concern. Maybe you could streamline your case a little bit now that Mr. Crosby won't be here, at least to start, or maybe he will be here, I don't know.

* * *

UNITED STATES DISTRICT COURT
DISTRICT OF MINNESOTA
THIRD DIVISION
3-88 CR 40(1)

(Caption Omitted In Printing)

ORDER

The above matter is before the court upon the motion of the government to proceed with the trial of the above-entitled action in the absence of the defendant Michael J. Crosby.

Based upon all files, records, and proceedings had herein, the court makes the following:

FINDINGS OF FACT

1. The defendant Michael J. Crosby had complete, full, and adequate notice of the charges and proceedings against him in this action and had complete, full, and adequate notice of a scheduled trial date of October 12, 1988, at 9:30 a.m. In that regard:

a) At a pretrial conference on August 15, 1988, at which the defendant Crosby was present, the court advised counsel and all parties of the trial setting of October 12, 1988.

b) On September 12, 1988, the Office of the Clerk sent to all counsel a notice of jury trial advising all parties through their counsel that the action had been set for jury trial at St. Paul, Minnesota on Wednesday, October 12, 1988, at 9:30 a.m.

c) On September 30, 1988, at a pretrial conference at which all counsel and all parties, except the defendant

Tamara M. Kesler, were present, the court again notified the parties and their attorneys of the trial date of October 12, 1988. At that pretrial conference, in the presence of the defendant Crosby, his counsel Douglas Altman advised the court that he had no objection to the October 12, 1988, trial setting.

d) At a hearing conducted on October 7, 1988, on various motions made by the defendant Michael J. Crosby through his counsel, the trial setting of October 12, 1988, was again referred to by the court and counsel.

2. Three co-defendants, Martin Cheatham, James Sannes, and Jack Cunningham, and their counsel, appeared and stood ready to begin trial on October 12, 1988, over denial of motions for severance.

3. On October 12, 1988, the defendant Michael J. Crosby failed to appear for trial. On that date the court ordered and executed a warrant calling for the apprehension of Michael J. Crosby. At that time and place all other counsel, all other parties, the judge, all court personnel, and 54 jurors were present and ready to commence trial of the action.

4. The Office of United States Marshal has advised the court and counsel that in attempting to execute the warrant they were unable to locate the defendant Crosby at his place of residence in the District of Minnesota. A search of his residence by the Marshals would indicate that the residence has been abandoned by the defendant Crosby.

5. The court, has pursuant to 18 U.S.C. § 3146(d), declared a forfeiture of the $100,000.00 recognizance bond

filed by the defendant, all pursuant to a hearing conducted in open court on October 13, 1988, at which time there were present counsel for the government, counsel for the defendant, Mr. Allan G. Goldberg, representative of the International Fidelity Insurance Company, and the defendant's father Joseph Krzyzaniak and brother Neal Krzyzaniak, both of whom assisted in arranging for the bond filed on behalf of the defendant.

6. None of the parties present at the hearing for forfeiture on October 13, 1988, were able to provide any information to the court as to the defendant's whereabouts.

7. The defendant Crosby has deliberately, voluntarily, knowingly, and without justification failed to be present of the designated time and place for the trial of the action.

8. No evidence has been presented to the court as to the defendant's present whereabouts and there is no reasonable probability that the defendant could be located shortly or that the trial could be rescheduled with the defendant Crosby in attendance.

9. The rescheduling of this trial would present extreme difficulty to the government, to the witnesses for the government, to defense counsel, and to the court.

10. The possibility of having to undertake two trials of the above-entitled action would impose a substantial burden upon the government, on the witnesses for the government, and on the court. The government has listed 83 potential witnesses and in excess of 400 proposed exhibits for the trial of this action.

11. The conduct of more than one trial in this action would place an undue burden on the multitude of witnesses proposed to be called by the government, many of whom are elderly or infirm.

12. Upon the foregoing, the court makes the following:

CONCLUSIONS OF LAW

1. The defendant Michael J. Crosby has voluntarily waived his constitutional right to be present during the trial of this action.

2. The public interest in proceeding with the trial of this action in the absence of the defendant Michael J. Crosby outweighs the interest of the defendant Crosby to be present during the conduct of the trial of this action.

3. Upon the foregoing,

IT IS ORDERED That the above-entitled action continue to trial on October 17, 1988, in the absence of the defendant Michael J. Crosby.

DATED: October 19 , 1988.

/s/ Donald D. Alsop
DONALD D. ALSOP
Chief U.S. District Judge

UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT

No. 89-5450

United States of America, Appellee, v. Michael J. Crosby, Appellant.	* * * * * * *	Appeal from the United States District Court for the District of Minnesota.

Submitted: May 18, 1990

Filed: October 16, 1990

Before JOHN R. GIBSON, Circuit Judge, BRIGHT, Senior Circuit Judge, and FAGG, Circuit Judge.

JOHN R. GIBSON, Circuit Judge.

Michael J. Crosby did not appear in court on the date set for commencement of his criminal trial, was tried *in absentia*, and was convicted. The issues in this case revolve primarily around this somewhat unusual circumstance and whether Rule 43 of the Federal Rules of Criminal Procedure applies because Crosby was not present when the trial commenced. We hold that a defendant who

does not appear for his criminal trial, including the commencement of it, waives the protections of Rule 43 and the rights incorporated in that rule. We affirm the conviction.

Crosby was charged, together with Martin Cheatham, James Sannes and Jack Cunningham, with numerous criminal offenses arising out of a fraudulent scheme in which customers paid for, but never received, silver commemorative medallions. The facts are set out in detail in *United States v. Cheatham*, 899 F.2d 747, 748-50 (8th Cir. 1990), and for the most part are immaterial to the issues presented in this case. It suffices to say that the case was set for trial on October 12, 1988. Crosby was present at a pretrial conference on August 15, 1988, when the court[1] advised counsel for all parties of the trial setting. On September 12, 1988, the clerk sent a notice to all counsel confirming the date. On September 30, 1988, Crosby was present at a pretrial conference and, again, the court notified the parties and attorneys of the October 12 trial date. At that time, Crosby's counsel informed the court that he had no objection to the October 12 trial setting. On October 7, the trial court heard various motions which Crosby made through his counsel, and again the trial setting of October 12 was referred to by court and counsel.

On October 12, 1988, Cheatham, Sannes and Cunningham and their counsel appeared, ready for trial. Crosby failed to appear. The district court ordered a

---

[1] The Honorable Donald D. Alsop, Chief Judge, United States District Court for the District of Minnesota.

warrant issued and executed. As the district court stated in its order entered on October 14, delaying trial until October 17, "all other counsel, all other parties, the judge, all court personnel, and 54 jurors were present and ready to commence trial." *United States v. Crosby*, No. 3-88 CR 40(1), slip op. at 2 (D. Minn. Oct. 14, 1988). The marshal's office informed the court and counsel it was unable to locate Crosby at his residence. The order delaying trial stated: "[A] search of his residence by the Marshals would indicate that the residence has been abandoned by the defendant Crosby." *Id.* at 2-3. The district court ordered Crosby's bond of $100,000 forfeited and found that Crosby "deliberately, voluntarily, knowingly, and without justification failed to be present at the designated time and place for the trial of the action." *Id.* The court further found that no evidence was presented as to the defendant's whereabouts and there was no reasonable probability that he could be located shortly or the trial rescheduled with Crosby in attendance. *Id.* observing that the government had listed eighty-three potential witnesses and more than four-hundred proposed exhibits for the trial, the district court found that rescheduling posed extreme difficulties and that undertaking two separate trials would place a substantial burden on the government and the court. The court found that Crosby "voluntarily waived his constitutional right to be present during the trial" of the action and "[t]he public interest in proceeding with the trial in the absence of . . . Crosby outweigh[ed] the interest of the defendant Crosby to be present during the conduct of the trial. . . . " *Id.* at 4.

The trial commenced October 17, and the jury rendered a verdict November 18, 1988, finding Crosby guilty

on twenty-five counts of mail fraud. Crosby was arrested on June 14, 1989 and later sentenced to four consecutive five-year terms on twenty-two of the counts; the trial judge suspended imposition of sentence on the three remaining counts, and placed Crosby on five years probation to commence upon completion of the sentences on the other counts, conditioned upon payment of $550,000 restitution to the victims during the period of probation. Insofar as other facts are material to the issues raised, they will be set forth with respect to each of the arguments.

I.

Crosby argues that Rule 43 of the Federal Rules of Criminal Procedure plainly requires his presence at the commencement of trial as a prerequisite to continuing the trial in his absence.[2] He argues that Rule 43 incorporates

---

[2] Rule 43 provides in relevant part:

(a) Presence Required. The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.

(b) Continued Presence Not Required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, *initially present*,

(1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial). . . . (emphasis added).

preexisting law as set forth in *Diaz v. United States*, 223 U.S. 442 (1912). In *Diaz*, a criminal defendant voluntarily absented himself from his own trial on two separate occasions, but nonetheless consented that the trial should proceed without him. *Id.* at 445. Diaz appealed his conviction on the ground that his absences from trial prevented him from exercising his constitutional right to confront all witnesses who testified against him. The Supreme Court rejected Diaz's claim, relying on the prevailing rule that:

> [W]here the offense is not capital and the accused is not in custody, . . . if, after the trial has begun in his presence, [the defendant] voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial, but, on the contrary, operates as a waiver of his right to be present and leaves the court free to proceed with the trial in like manner and with like effect as if he were present.

Id. at 455 (citations omitted). *Diaz* dealt only with the situation where a trial had commenced and the defendant thereafter voluntarily absented himself.

In essence, Crosby's argument is based upon the plain language of Rule 43. Crosby interprets paragraph (b) of Rule 43 to say that before a court can try a criminal defendant *in absentia*, the defendant must have at least been present at the outset of the trial. Crosby recognizes that a number of other circuits have held contrary to his position, but criticizes the reasoning in those decisions and particularly their treatment of *Diaz*. He also points to the extreme prejudice resulting from his absence at trial. On the strength of these two points, Crosby asks us to set

aside the district court decision and remand this case for a new trial.

This circuit has not yet dealt with the application of Rule 43 where a criminal defendant such as Crosby is tried and convicted *in absentia*. Other circuits facing the issue have allowed convictions to stand on a theory of waiver. We are persuaded that we should do likewise.

The notes of the advisory committee on rules make clear that the first sentence of Rule 43 is a restatement of existing law. Fed. R. Crim. P. 43, notes of advisory committee on rules (note 1). We are satisfied that the language of Rule 43 does no more than restate the holding in *Diaz*. The reasoning in *Diaz* applies equally to the factual circumstances in this case where the defendant fails to appear for commencement of trial, as it does in the situation where the defendant appears at the commencement and then absconds. In both cases, the defendant waives his Rule 43 right to be present during trial when he voluntarily absents himself from the courtroom.

In discussing this issue in *Government of the Virgin Islands v. Brown*, 507 F.2d 186, 189 (3d Cir. 1975), Judge Rosenn pointed out that Rule 43 was merely a paraphrase of the holding in *Diaz*. In *Brown*, the defendant was absent from court on the first morning of voir dire. He appeared in court that afternoon, made no explanation for his earlier absence, and observed the remaining voir dire examination without making any objection. Brown was present throughout the remainder of his trial. Following conviction, Brown appealed to the Third Circuit, arguing that conducting the voir dire proceedings of the first morning in his absence violated his constitutional

and statutory rights. The Third Circuit rejected his claim, holding that "Brown's willful absence from the voir dire examination . . . was knowing and voluntary, and that this voluntary absence was a waiver of both his constitutional and statutory right to be present at the commencement of his trial." *Id.* at 189.

We agree with Judge Rosenn that there are no talismanic properties "which differentiate the commencement of a trial from later stages." *Id.* In fact, the voir dire examination is probably not as critical as cross-examination of the key witnesses, which occurs in the later phases of a trial. It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial. *Id.* Judge Rosenn did note that the commencement of trial would take on special significance under the rule if the defendant did not know when the trial was to begin, since in that case he could not be said to have knowingly waived his right to be present. *Id.* In *Brown*, however, one of the conditions for the defendant's release on bail was that the defendant appear at the start of the trial. Thus, it was clear that the *Brown* defendant knew his trial date.

The facts in Crosby's case are identical in many respects to those in *Brown*. Both defendants were released from custody on bail before their trial. Both voluntarily failed to attend the beginning of trial and neither offered any explanation for his absence. Crosby knew beyond question that his trial would start on October 12. In Crosby's case, as in *Brown*, the district court painstakingly outlined the times when Crosby received and acknowledged notice of that date.

Our decision to follow *Brown* is bolstered by the fact that other circuits have treated this issue in similar fashion. In *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976), the Fourth Circuit also concluded that a defendant's voluntary absence at the commencement of trial was a waiver under rule 43 just as if the defendant had attended the beginning of a trial and then later absconded. The court reasoned that:

> [t]o permit a defendant, free on bail, to obstruct the course of justice by absconding without a compelling reason, after having received actual notice of the time and place of trial, is as inconsistent with the purposes of the rule as to permit a defendant to abscond after the trial has commenced. We therefore hold that a defendant may waive his right to be present at the commencement of his trial just as effectively as he can waive his right to be present at later stages of the proceedings.

Id. at 184.

The Second Circuit in *United States v. Tortora*, 464 F.2d 1202, 1208 (2d Cir.), *cert. denied, Santoro v. United States*, 409 U.S. 1063 (1972), reached a similar conclusion, stating:

> Waiver of a constitutional right must be both "knowing" and "voluntary." A defendant who deliberately fails to appear in court does so voluntarily, and thus the important question is whether his absence can be considered a "knowing" waiver. We hold that it can. The deliberate absence of a defendant who knows that he stands accused in a criminal case and that the trial will begin on a day certain indicates nothing less than an intention to obstruct the orderly

> processes of justice. No defendant has a unilateral right to set the time or circumstances under which he will be tried.

The *Tortora* Court did not hold that the district court should proceed *in absentia* in every case in which the defendant voluntarily absented himself, but that the decision of whether to proceed is "within the discretion of the trial judge, to be exercised only when the public interest outweighs that of the voluntarily absent defendant." *Id.* at 1210.

In *United States v. Sanchez*, 790 F.2d 245 (2d Cir.), *cert. denied*, 479 U.S. 989 (1986), the Second Circuit gave further guidance on the parameters of the district court's discretion to try a defendant *in absentia*. The *Sanchez* court wrote:

> [D]istrict judges must have broad discretion in determining whether to proceed with a trial *in absentia*. . . .
>
> In the present case, it is enough that, in a case with more than one defendant, Sanchez waived his right to be present by failing to appear without explanation and while on bail; that some reasonable steps, including a one-day continuation with notification to his attorney and the issuance of a bench warrant, were taken unsuccessfully in response to his non-appearance; that there was no reason to believe that the trial could likely soon be held with Sanchez present; and that severance would impose on the Government the burden of prosecuting two separate trials that would involve substantially the same evidence.

Id. at 251.

Read together, these cases provide the factors a district judge should consider when deciding whether to try a defendant *in absentia*. They include: the likelihood that the trial can take place with the defendant present, the difficulty of rescheduling, and the burden on the government and inconvenience to jurors of having to undertake two trials, particularly in a multiple defendant case. The district court carefully considered each of these factors before deciding to commence the trial without Crosby. It delayed the trial five days, trying to obtain Crosby's presence, before finally concluding that it would be unable to secure Crosby. Rescheduling of this case would have greatly disrupted the court's schedule and imposed a burden on the witnesses by requiring many of them to appear a second time.[3] Some of the witnesses were elderly with attendant problems of memory loss and the possibility that they might die before the trial could be rescheduled. In light of these conditions, holding two separate trials, one for three defendants and the other if and when Crosby was found, presented the court and jurors with significant inconvenience. Following the analysis suggested by the Second and Fourth Circuits, we have no difficulty satisfying ourselves that Crosby waived his right to be present at trial and that the district court acted within its discretion in trying Crosby *in absentia* together with the other three defendants who appeared at trial.

---

[3] The government had subpoenaed eighty-three witnesses, including witnesses from Virginia, rural Alabama, Wyoming, Iowa, Nebraska, North Dakota, Texas, New York, and Canada.

II.

Crosby also contends that the district court erred in failing to remove court-appointed counsel Douglas Altman as Crosby requested in a motion on Friday, October 7, just five days before the scheduled start of trial. We are satisfied that Judge Alsop did not abuse his discretion in denying this last-minute request to remove.

Crosby had attempted to discharge Altman in a motion twenty-nine days earlier, citing at that time a long list of issues on which Crosby and his counsel did not agree. At the previous hearing Altman also asked for permission to withdraw from the case. Magistrate Janis Symchych denied both requests, pointing out that Crosby was not entitled to select the individual attorney who would represent him when he was served by court-appointed counsel. *United States v. Crosby*, No. CR 3-88-40, slip op. at 1 (D. Minn. Sept. 23, 1988). Just as Crosby could not select his appointed counsel, he was also not at liberty to discharge that attorney. *Id.* Magistrate Symchych also concluded that the issues Crosby listed did not raise concern about ineffective assistance of counsel and that Altman could be prepared for trial by October 12. *Id.* at 1-2.

Shortly before trial, in a hearing before Judge Alsop, Crosby renewed his earlier motion to remove Altman. At that time, Altman again moved for permission to withdraw from the case. Judge Alsop heard the motions *in camera* and also denied both requests.

In *United States v. Hart*, 557 F.2d 162, 163 (8th Cir.), *cert. denied*, 434 U.S. 906 (1977), we held that a district court has broad discretion when determining whether

substitution of counsel is warranted. "The trial court, when confronted by such an allegation, has an obligation to inquire thoroughly into the factual basis of the defendant's dissatisfaction." *Id.* But, "[t]he right to effective assistance of counsel may not be improperly manipulated by an eleventh hour request to obstruct the orderly administration of justice." *Id.*

It is evident that there were disagreements between Crosby and his counsel. In denying Crosby's second motion to remove, Judge Alsop made a thorough investigation of the conflicts between Crosby and Altman, and made every reasonable effort to resolve them. Most of the difficulty seemed to be over Crosby's concern for obtaining financial documents he believed were necessary to his defense. In particular, there were two areas of concern. First, Crosby claimed that his attorney failed to use court-appointed accounting services to prepare financial summaries of documents stored in Crosb[illegible]rage.[4] Second, Crosby believed that financial records [illegible]red in a warehouse in California were also critical to his defense. He complained that Altman would not help him arrange to retrieve these records.[5]

---

[4] For at least six weeks before trial Crosby assured Altman that Crosby's father was organizing these records. This turned out to be untrue. Crosby did not inform Altman about the true state of these records until very close to trial. For this reason, Judge Alsop was less than sympathetic when Crosby attempted to lay blame on his attorney for failing to adequately prepare these records.

[5] Crosby contended that these California records were stored randomly throughout a warehouse along with furniture

(Continued on following page)

Judge Alsop made every effort to provide a remedy. He had already previously authorized funding for Crosby and his codefendants to employ a professional accountant in preparation for trial. The judge extended the scope of that funding so that Crosby could have the same accounting firm provide whatever additional services Crosby needed with respect to the disorganized financial records. In addition, he arranged for Crosby, if necessary, to personally fly to California to retrieve whatever records were stored there.[6] We are persuaded, as was Judge Alsop, that these two solutions resolved all significant conflicts between Crosby and Altman.

Crosby makes clear that he raises no claim of ineffective assistance of counsel, reserving this for later presentation. The record reveals that Crosby's counsel called numerous witnesses from all parts of the United States and vigorously presented a defense for Crosby. Crosby's counsel spent two days and questioned eight witnesses as part of Crosby's defense. The witnesses were from California, Canada, South Dakota, Texas and Virginia. The defense denied all allegations of fraud and attempted to show that Crosby was merely a poor administrator legitimately trying to establish a non-profit business. The

---

- (Continued from previous page)

and other papers, and that he was the only person who could identify the relevant items. A problem arose because the conditions of Crosby's bail did not permit him to leave Minnesota. Crosby complained that Altman did not do whatever was necessary to remove this travel restriction.

[6] The record does not reveal whether Crosby went to California.

accounting testimony, Crosby's primary bone of contention with respect to the removal of Altman as counsel, was not presented by any of the defendants' counsel. The government's case contains strong evidence against Crosby, including the fact that he received the major share of the proceeds of the fraudulent scheme and controlled the money, and substantial evidence of personal expenditures by Crosby, totaling some $260,000, while bills of the business went unpaid. While there were difficulties between Crosby and his lawyer, there is no evidence in the record of a breakdown in communication or that Altman was prevented from adequately presenting a defense. *See United States v. Wagner*, 834 F.2d 1474, 1482 (9th Cir. 1987); *Lowenfield v. Phelps*, 817 F.2d 285 (5th Cir. 1987), *aff'd in part*, 484 U.S. 231 (1988). The decision whether to remove counsel was completely within the district judge's discretion. We are satisfied that Judge Alsop did not abuse his discretion in this case by denying Crosby's request.

III.

Crosby also argues that he was prejudiced when counsel for defendant Cheatham questioned his brother Phillip Krzyzaniak, regarding whether Crosby knew when the trial was to begin and that he was supposed to be there. When Krzyzaniak took the stand, Cheatham's counsel indicated that he intended to examine Krzyzaniak on a number of issues, but the district court carefully limited the examination to Crosby's knowledge of the trial dates, the fact that he had planned to show up and that he did not. The district court ordered counsel not to examine the witness concerning the bond and who

put it up, but that only "flight" evidence was admissible. In his reply brief Crosby argues that admission of evidence of flight requires a showing of immediacy linking flight to the time of commission or accusation of the offense charged. Crosby claims that evidence probing his voluntary absence from trial does not qualify as flight evidence because it fails this immediacy requirement. He further claims that his absence from trial is irrelevant when determining his guilt or innocence since the absence was not related in time to either the time of the alleged offense or the time of accusation.

We are not convinced by the argument. As the Sixth Circuit explained in *United States v. Touchstone*, 726 F.2d 1116, 1119 (6th Cir. 1984):

> "[F]light" is generally admissible as evidence of guilt, and . . . juries are given the power to determine "how much weight should be given to such evidence." *United States v. Craig*, 522 F.2d 29, 32 (6th Cir. 1975), . . . [I]mmediacy "generally only becomes important in those cases where the defendant does not know, or his knowledge is doubtful, about the charges and accusations made against him." *United States v. Hernandez-Miranda*, 601 F.2d 1104, 1106 (9th Cir. 1979).

See also United States v. Peltier, 585 F.2d 314, 322-24 (8th Cir. 1978), *cert. denied*, 440 U.S. 945 (1979) (discussing the probative value of flight evidence in determining guilt or innocence). Because Crosby knew the charges against him and his scheduled trial date, there was no abuse of discretion in admitting this evidence.

IV.

Crosby's final argument is that the district court erred in conditioning probation on restitution of $550,000 to the victims of his fraud. He argues that the full $550,000 is not properly related to the offenses for which he was convicted. Crosby cites in his defense *United States v. Missouri Valley Construction Co.*, 741 F.2d 1542 (8th Cir. 1984) (en banc), in which this court stated:

> [W]here a defendant has been charged with crimes against several persons, but convicted on only some of the counts, the court may not order the defendant, as a condition of probation, to make payments to any persons who were not aggrieved by the precise acts charged in those counts on which conviction was had.

Id. at 1547. He argues that under *Missouri Valley*, the court can only sentence him to pay restitution to those forty-two victims who were expressly named in the indictment. Crosby's reading of *Missouri Valley* fails to recognize the true issue in that case. In *Missouri Valley*, the defendant corporation pled guilty to criminal conspiracy. In its sentence, the district judge imposed "as a condition of probation, in lieu of a fine, the requirement that [the corporation] contribute money to a charitable organization that [had] not suffered actual damages or loss from the corporation's criminal offense." *Missouri Valley*, 741 F.2d at 1544.[7] We vacated the sentence because it required

[7] The district judge imposed sentence pursuant to 18 U.S.C. § 3651 (1982 & Supp. II 1984) which was repealed, Act of Oct. 12, 1984, Title II, c. II, § 212(a)(2), 98 Stat. 1987, but which

(Continued on following page)

the defendant to pay restitution to someone other than a party "who suffered losses 'caused by the offense for which the conviction was had.'" *Id.* at 1547.

While *Missouri Valley* is not helpful to us, three days after the case before us was argued, the United States Supreme Court held in *Hughey v. United States*, 109 L. Ed. 2d 408 (1990), that a restitution order under 18 U.S.C. § 3579(a)(1) (1982) is limited to losses caused by the conduct underlying the offense of conviction.

Judge Alsop in his restitution order stated that the total loss for the twenty-five counts for which Crosby was convicted was $291,303. Should the court be without authority to order restitution in the amount of $550,000 for the 412 victims, we believe that under the principles of *Hughey* the $291,303 restitution figure is undoubtedly

---

(Continued from previous page)

still applies to offenses committed prior to November 1, 1986. The relevant portion of § 3651 states:

> The court may revoke or modify any condition of probation, or may change the period of probation.
>
> . . . .
>
> While on probation and among the conditions thereof, the defendant –
>
> > May be required to pay a fine in one or several sums; and
> >
> > May be required to make restitution or reparation to aggrieved parties for actual damages or loss caused by the offense for which conviction was had . . . .

sustainable. We are satisfied, however, that the appropriate course is to remand the case to the district court for further consideration of its restitution order in light in *Hughey*. This panel will retain jurisdiction of this appeal. If either party is aggrieved after the entry of the district court's order reconsidering the restitution award in light of *Hughey*, we will give further consideration to this issue on an expedited basis.

AMENDED

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

(Caption Omitted In Printing)

Order Denying Petition
For Rehearing and Suggestion
For Rehearing En Banc

Suggestion for rehearing en banc, filed by the appellant, has been considered by the court and is denied by reason of the lack of a majority of the active judges voting to rehear the case en banc. Chief Judge Lay, Judge McMillian and Judge Arnold voted to grant the petition for rehearing en banc.

Petition for rehearing by the panel is also denied.

May 8, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gins

Clerk, U.S. Court of Appeals, Eighth Circuit.

United States Court of Appeals

FOR THE EIGHTH CIRCUIT

(Caption Omitted In Printing)

Appeal from the United States
District Court for the
District of Minnesota

JUDGMENT NUNC PRO TUNC

The judgment of the district court is affirmed. This judgment is entered nunc pro tunc to January 24, 1991, the date appellant notified this court of his agreement with the district court's amended judgment and commitment order entered after this court's opinion of limited remand.

Appellant filed a petition for rehearing on other issues, which was denied May 8, 1991. The filing of a petition for rehearing presupposes the existence of a final panel decision and the entry of judgment of this court as required by Rule 36 of the Federal Rules of Appellate Procedure. The record is hereby corrected to show entry of judgment.

September 30, 1991

Order Entered at the Direction of the Court:

/s/ Michael E. Gins

Clerk, U.S. Court of Appeals, Eighth Circuit.

Supreme Court of the United States

No. 91-6194

Michael Crosby,

Petitioner

v.

United States

ON PETITION FOR WRIT OF CERTIORARI to the United States Court Court [sic] of Appeals for the Eighth Circuit.

ON CONSIDERATION of the motion for leave to proceed herein in forma pauperis and of the petition for writ of certiorari, it is ordered by this Court that the motion to proceed in forma pauperis be, and the same is hereby, granted; and that the petition for writ of certiorari be, and the same is hereby, granted.

March 2, 1992

Supreme Court, U.S.
FILED
MAY 1 1992
OFFICE OF THE CLERK

No. 91-6194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL CROSBY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Eighth Circuit

---

PETITIONER'S BRIEF ON THE MERITS

MARK D. NYVOLD
(Appointed by this Court)
Suite 654, Capital Centre
386 North Wabasha Street
Saint Paul, Minnesota 55102
(612) 223-5175
Counsel for Petitioner

QUESTION PRESENTED

Whether Federal Rule of Criminal Procedure 43 and the United States Constitution permit the trial *in absentia* of a defendant who is not present at the beginning of his trial?

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
TABLE OF AUTHORITIES	v
OPINION BELOW	1
JURISDICTIONAL STATEMENT	1
CONSTITUTIONAL PROVISIONS AND RULE INVOLVED	2
STATEMENT OF THE CASE	3
SUMMARY OF THE ARGUMENT	8
ARGUMENT:	
FEDERAL RULE OF CRIMINAL PROCEDURE 43 AND THE UNITED STATES CONSTITUTION DO NOT PERMIT THE TRIAL *IN ABSENTIA* OF A DEFENDANT WHO IS NOT PRESENT AT THE BEGINNING OF HIS TRIAL	12
A. The plain wording of Rule 43 prohibited the district court from trying the Petitioner *in absentia* because the Rule expressly limits waiver of the right to be present to defendants who are "initially present" at trial	12
B. Rule 43's origins in the Constitution and the common law leave no doubt that the Rule does not permit the trial *in absentia* of a defendant not initially present	14
C. Courts holding that a defendant not initially present for his trial may be tried in his absence misconstrue *Diaz v. United States* and Rule 43	18

TABLE OF CONTENTS—Continued

	Page
D. Aside from Rule 43's plain language and its Constitutional and common law underpinnings, considerations of sound procedure and practice in the Federal judicial system require that this Court apply Rule 43 as written	24
E. Petitioner's absence from the trial was not harmless error	30
F. If Rule 43's limitation on *in absentia* trials is no longer desirable, the Rule can be changed, but until then it must be followed	33
CONCLUSION	34

TABLE OF AUTHORITIES

Cases	Page
Andrus v. Glover Construction Company, 446 U.S. 608 (1980)	25
Bank of Nova Scotia v. United States, 487 U.S. 250 (1987)	29
Blackwell v. Brewer, 562 F.2d 596 (8th Cir. 1977)	30
Chapman v. United States, 386 U.S. 18 (1967)	30
Colautti v. Franklin, 439 U.S. 379 (1979)	25
Cross v. United States, 325 F.2d 629 (D.C. Cir. 1963)	18
Cureton v. United States, 396 F.2d 671 (D.C. Cir. 1968)	18
Diaz v. United States, 223 U.S. 442 (1912)	*passim*
Faretta v. California, 422 U.S. 806 (1975)	17
Falk v. United States, 15 App. D.C. 446 (1899), *cert. denied*, 181 U.S. 618 (1901)	16, 23
Gore v. State, 52 Ark. 285, 12 S.W. 564 (1889)	23
Government of the Virgin Islands v. Brown, 507 F.2d 186 (3rd Cir. 1975)	*passim*
Government of the Virgin Islands v. George, 680 F.2d 13 (3rd Cir. 1982)	18
Illinois v. Allen, 397 U.S. 337 (1970)	13, 16, 28
Lewis v. United States, 146 U.S. 370 (1892)	16, 22, 23
Parker v. United States, 184 F.2d 488 (4th Cir. 1950)	18
Pearson v. United States, 325 F.2d 625 (D.C. Cir. 1963)	18
Reiter v. Sonotone Corporation, 442 U.S. 330 (1979)	25
Rogers v. United States, 422 U.S. 34 (1975)	13, 29, 30
Rushen v. Spain, 464 U.S. 114 (1983)	30
Sahlinger v. People, 162 Ill. 241 (1882)	23
Shields v. United States, 273 U.S. 583 (1927)	17
Snyder v. Massachusetts, 291 U.S. 97 (1934)	17
State v. Perkins, 40 La. Ann. 210, 3 So. 647 (1888)	23
Taylor v. United States, 414 U.S. 17 (1973)	14, 29
United States v. Alessandrello, 637 F.2d 131 (3rd Cir. 1980), *cert. denied*, 451 U.S. 949 (1981)	18
United States v. Alikpo, 944 F.2d 206 (5th Cir. 1991)	22

TABLE OF AUTHORITIES—Continued

Page

United States v. Barracota, 45 F.Supp. 38 (S.D.N.Y. 1942) 13

United States v. Brown, 571 F.2d 980 (6th Cir. 1978) 18

United States v. Camacho, 955 F.2d 950 (4th Cir. 1992) 27

United States v. Crutcher, 405 F.2d 239 (2nd Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) 13, 30, 32

United States v. Gagnon, 470 U.S. 522 (1985) 17, 29

United States v. Garcia-Turino, 458 F.2d 1345 (9th Cir. 1972) 18

United States v. Hernandez, 842 F.2d 82 (5th Cir. 1988) 18, 28

United States v. Hernandez, 873 F.2d 516 (2nd Cir. 1989) 27

United States v. Houtchens, 926 F.2d 824 (9th Cir. 1991) 19

United States v. Hudson, 313 F.Supp. 422 (D.C. Del. 1970) 18

United States v. Jones, 567 F.2d 965 (10th Cir. 1977) 25

United States v. Mera, 921 F.2d 18 (2nd Cir. 1990) 27

United States v. Miller, 463 F.2d 671 (D.C. Cir. 1968) 18

United States v. Muzevsky, 760 F.2d 83 (4th Cir. 1985) 19

United States v. Noble, 294 Fed. 689 (D. Mont. 1923), *affirmed*, 300 Fed. 689 (C.C.A. 9th 1924) 13

United States v. Peterson, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976) ..... *passim*

United States v. Powell, 611 F.2d 41 (4th Cir. 1979) 19

United States v. Sanchez, 790 F.2d 245 (2nd Cir.), *cert. denied*, 479 U.S. 989 (1986) 19, 26, 27

United States v. Schockett, 753 F.2d 336 (4th Cir. 1985) 19

United States v. Songer, 842 F.2d 240 (10th Cir. 1988) 25

TABLE OF AUTHORITIES—Continued

Page

United States v. Tortora, 464 F.2d 1202 (2nd Cir.), *cert. denied*, *Santoro v. United States*, 409 U.S. 1063 (1972) 27, 28

United States v. Vassalo, 52 F.2d 699 (E.D. Mich. 1931) 13

United States v. Wright, 932 F.2d 868 (10th Cir. 1991) 19

United States Constitution

Amendment V 2, 8, 17

Amendment VI ..... *passim*

Amendment XIV 17

Statutes

28 U.S.C. 2072 33

28 U.S.C. 2073 33

28 U.S.C. 2074 33

Philippine Civil Government Act, Section 5 ..... 14, 15, 20, 21

Federal Rules of Criminal Procedure

Rule 43 ..... *passim*

Rule 43(b) 2, 12, 13, 25

Rule 43(b)(1) 2, 9, 12, 13

Rule 52(a) 30

Rule 54 25

Miscellaneous

Advisory Committee Note to Federal Rule of Criminal Procedure 43 13

8B *Moore's Federal Practice*, § 43.01[1] (2d ed. 1980) 13

C. Wright, *Federal Practice and Procedure*, § 721 (1982) 13

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-6194

MICHAEL CROSBY,

Petitioner,

v.

UNITED STATES,

Respondent.

On Writ of Certiorari to the
United States Court of Appeals
for the Eighth Circuit

PETITIONER'S BRIEF ON THE MERITS

OPINION BELOW

The opinion of the Eighth Circuit Court of Appeals is reported at 917 F.2d 362 (8th Cir. 1990) (J.A. 52-69).

JURISDICTION

The Court of Appeals entered its judgment on September 30, 1991, *nunc pro tunc* to January 24, 1991 (J.A. 71). That Court had previously denied a petition for rehearing and suggestion for rehearing *en banc* on May 8, 1991 (J.A. 70). Petitioner's petition for a writ of *certiorari* was docketed on October 21, 1991, and

granted on March 2, 1992 (J.A. 72). This Court's jurisdiction is invoked under 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND RULE INVOLVED

United States Constitution, Amendment V:

> No person shall . . . be deprived of life, liberty, or property, without due process of law . . . .

United States Constitution, Amendment VI:

> In all criminal prosecutions, the accused shall enjoy the right . . . to be confronted with the witnesses against him . . . [and] to have the Assistance of Counsel for his defense.

Federal Rule of Criminal Procedure 43. Presence of the Defendant.

> (a) Presence Required. The defendant shall be present at the arraignment, at the time of plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) Continued presence not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> > (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or
> >
> > (2) after being warned by the court that disruptive conduct will cause removal of the defendant from the courtroom, persists in conduct which is such to justify exclusion from the courtroom.
>
> (c) Presence Not Required. A defendant need not be present in the following situations:

> > (1) A corporation may appear by counsel for all purposes.
> >
> > (2) In prosecutions for offenses punishable by fine or imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.
> >
> > (3) At a conference or argument upon a question of law.
> >
> > (4) At a reduction of sentence under Rule 35.

STATEMENT OF THE CASE

On April 20, 1988, a Federal Grand Jury in Minnesota indicted Petitioner and six others on thirty-six counts of mail fraud (J.A. 1).[1] The indictment alleged that Petitioner and his co-defendants had devised a fraudulent scheme to sell military-veteran commemorative medallions to fund construction of a theme park honoring veterans. The facts of the scheme alleged by the indictment are not relevant to the issue on which this Court granted the Writ.

The Petitioner made his first appearance on the indictment on June 15, 1988, before a Federal magistrate in Minneapolis, Minnesota, the Honorable J. Earl Cudd, who ordered him detained (J.A. 1). After a detention hearing on June 23, 1988, Magistrate Cudd set conditions of release for Petitioner, which included the execution of a $100,000 surety bond and a requirement to report every week-day to the court's pretrial services office (*Id.*; Tr. Vol. I, 36, 37).[2] Another condition required him to remain in the State of Minnesota unless permitted by

---

[1] "J.A." refers to the Joint Appendix.

[2] "Tr." refers to the transcript of the proceedings in the district court.

the court to leave (Tr. Oct. 7, 1988 hrg., 16). Petitioner posted the bond on July 5, 1988 (J.A. 1).

On July 28, 1988, the district court set a pretrial conference for August 15, 1988, which Petitioner attended (J.A. 1). The presiding judge, the Honorable Donald D. Alsop, Chief Judge for the United States District Court for Minnesota, announced that the trial would begin October 12, 1988, but did not give a specific starting time for that date (*Id.*). The court clerk, however, sent out a trial notice to counsel on September 12, 1988, advising that trial would start at 9:30 a.m. on October 12 (*Id.*).

On September 16, 1988, Petitioner's counsel, Douglas Altman, filed a motion to withdraw, which Magistrate Janice Symchych heard on September 19 (J.A. 2). Petitioner attended the hearing, during which the prosecutor and the Magistrate made several references to a trial date of October 12 (Tr. Sept. 19, 1988 hrg., 3, 5, 7, 12). At another pre-trial conference held on September 30, 1988, attended by Petitioner and Mr. Altman, Altman said he had no objection to the trial starting on October 12 (J.A. 2). Mr. Altman later renewed his motion to withdraw, and at a hearing on the renewed motion held October 7, 1988, the court, counsel, and Petitioner all referred to the trial date of October 12 (Tr. Oct. 7, 1988 hrg., 3, 8, 15, 19, 20).

On the morning of Wednesday, October 12, 1988, the Petitioner did not appear at the 9:30 a.m. start of his trial (J.A. 7). No one knew his whereabouts (J.A. 8, 10). At 10:25 a.m., Mr. Altman told Judge Alsop that since 9:30 a.m. he had been trying to contact the Petitioner by phone but without success (J.A. 9-10). A few minutes later, Judge Alsop ordered the clerk's office to issue a warrant for Petitioner's arrest, which the Judge signed before noon that day and gave to the marshals to execute (J.A. 12, 16). The court also contacted the Petitioner's bondsman to enlist his assistance in locating the Petitioner (J.A. 20).

Some time after 1:30 p.m. on October 12, a deputy reported to the court and to the parties that two other deputies had gone to the Petitioner's home after he had failed to appear in court that morning, and had looked in the windows. Based on their observations, the deputy told the court that "the place looked like it is cleaned out" (J.A. 19). He also reported that while the deputies were at the home, neighbors reported to them having seen Petitioner's car backed halfway into his garage the previous evening, giving the neighbors the impression that he might possibly be packing his trunk (*Id.*).

The court then said that it would postpone the trial on a day-by-day basis and make no decision on starting in the Petitioner's absence until the following Monday, October 17, but that it would conduct a bail forfeiture hearing the next morning, October 13, at 8:30 a.m. (J.A. 18, 20). The court remarked that it had not planned to conduct trial on Fridays in any event, so Friday, October 14, would not be a lost day (J.A. 20), and that it would try to get another case tried in the one or two days it was planning to wait to begin the Petitioner's trial, although it was having difficulty contacting one of the lawyers involved in the other case (J.A. 26-28). When the court raised the subject of conducting the trial in the Petitioner's absence, Mr. Altman objected (J.A. 15, 33).

The defendants present for trial, James Sannes, Jack Cunningham, and Martin Cheatham told the court that they wanted a continuance until the Petitioner could be located because they wanted to call him as a witness (Tr. Vol. I, 8-13, 22-23). (The Petitioner had provided co-defendants Cunningham and Sannes with his own affidavit stating that if his case were severed that he would testify in their defense (*Id.*)). Co-defendants Cunningham and Sannes said they would waive their speedy trial rights to obtain the continuance (J.A. 22-23).

The court requested everyone to remain until 4:30 p.m., when an update would be available from the deputy marshals looking for the Petitioner (J.A. 24). As the afternoon progressed, the court remarked several times that the pool of 54 potential jurors was being kept waiting without any idea why, and that the delay in the proceedings would interfere with the court's calendar (J.A. 25-30). The prosecutor commented on the difficulty she would have in re-trying the case, should the petitioner later appear, because many of her witnesses were elderly and some had health problems (J.A. 23-25).

At the end of the day, a deputy marshal reported that the Petitioner had not been located and that she had no update as to how the investigation was proceeding (J.A. 31). The court told the parties that it did not want to call the prospective jurors back for the next day because there was no certainty the trial would start then, and ordered the case continued until Monday, October 17 for a decision on whether the case would proceed (J.A. 31-32). The prosecutor then said the Government's position was that it wanted the trial to proceed on Monday no matter what (J.A. 33). The co-defendants restated their position that they wanted the Petitioner present for the trial and were willing to wait for his return (J.A. 34-35).

The next morning, Thursday, October 13, the court held a bail forfeiture hearing (J.A. 3). Present were the prosecutor and the Petitioner's counsel, bondsman, father, and two of his brothers (J.A. 43). None of the persons at the hearing knew where the Petitioner was (*Id.*). The hearing resulted in the forfeiture of Petitioner's bond (J.A. 3, 43). In the afternoon, the court held another session with the prosecutor and the co-defendants (J.A. 36). The Petitioner still had not appeared, and the marshals had nothing further as to his whereabouts (J.A. 37). Immediately after the deputy marshal made his report, the court, in a change from its earlier plan to

wait until October 17 before deciding what to do, announced that it had prepared an order and findings permitting the trial to proceed in the Petitioner's absence (J.A. 37-38).

The court then asked the parties to state again their positions on starting or delaying the trial (J.A. 38-39). The Government said it was now making a formal request to begin the trial October 17, regardless of Petitioner's absence (J.A. 38). Counsel for the co-defendants again objected, stating that they were willing to waive their rights to a speedy trial until Petitioner returned or could be located (J.A. 39). The Petitioner's counsel also opposed the request (*Id.*). The court then stated for the record its findings of fact, which included that the Petitioner had had adequate notice of the trial date, citing the above-mentioned written trial notice and the court appearances at which the trial date had been mentioned, and that rescheduling the trial would present extreme difficulty to the Government, witnesses, counsel, and the court (J.A. 41-44).

The court put its findings and order in writing (J.A. 48-51), but while reading them into the record it made an additional finding that

> . . . the court at this time has been further advised that notwithstanding a 5 day or a 4 day postponement of the trial until Monday, October 17, the Marshal's service remains unable to locate or apprehend defendant Michael J. Crosby.

(J.A. 43).

The court filed its findings and order the next day, October 14, 1988 (J.A. 3). Trial began on Monday, October 17, in the Petitioner's absence, starting with jury selection, and continued in his absence to a conclusion on November 18, 1988, when the jury returned its verdicts, convicting all defendants on all counts but acquitting James Sannes (J.A. 4).

Deputy U.S. marshals arrested the Petitioner on May 11, 1989. On July 13, 1989, the Petitioner's trial counsel moved to withdraw, and the court then appointed Petitioner's present counsel (J.A. 4-5). On August 21, 1989, Judge Alsop sentenced Petitioner on his mail fraud convictions and imposed statutory-maximum five-year terms on each count of conviction (J.A. 5). The court ran four of the terms consecutively, making Petitioner's total sentence of imprisonment twenty years, followed by a five-year probationary term (*Id.*). The Petitioner appealed his convictions to the Eighth Circuit Court of Appeals. On the trial-*in-absentia* issue, the Circuit Court held that a defendant who does not appear for his trial waives the protection of Federal Rule of Criminal Procedure 43. (J.A. 52-53, 59).

SUMMARY OF ARGUMENT

A. The plain wording of Rule 43 prohibited the district court from trying the Petitioner *in absentia* because the Rule expressly limits waiver of the right to be present to defendants who are "initially present" at trial. The Notes of the Advisory Committee that drafted the Rule make it clear that these words of limitation are not mere surplusage or the result of an oversight in the rule-drafting process. The Notes state that the Rule is a restatement of existing law, citing this Court's decision in *Diaz v. United States*, 223 U.S. 442 (1912), which determined that the Sixth Amendment and the common law permit a defendant to be tried *in absentia* if he voluntarily absents himself after his trial begins.

B. Rule 43's right of presence has its origins not only in the Sixth Amendment and the common law, but in the Fifth Amendment Due Process Clause. A rule of orderly trial procedure fashioned by this Court and predating the Rules of Criminal Procedure constitutes another of Rule 43's roots. Because of the many and varied sources giving rise to the Rule, it is often spoken of as being broader than the Constitutional right of presence.

C. The Eighth Circuit Court of Appeals concluded that the Petitioner, even though not present when the trial started, nonetheless waived his right to be present. The Circuit Court reached this result by following a line of cases that superimposes on Rule 43 a waiver provision broader than the one it contains. These cases are best exemplified by the Fourth Circuit's decision in *United States v. Peterson*, 524 F.2d 167 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976), and the Third Circuit's decision in *Government of the Virgin Islands v. Brown*, 507 F.2d 186 (3rd Cir. 1975).

The first case, *Peterson*, avoids Rule 43(b)(1)'s "initially present" language by construing as non-binding dicta *Diaz*'s statement that a defendant may be tried in his absence if he departs after his trial begins. *Peterson* says that this statement simply reflects the factual situation in *Diaz* in which the defendant's waiver of the right to be present occurred (after the trial had begun), not an intent to limit trial *in absentia* only to defendants initially present.

Diaz's statement concerning the limits on trial *in absentia* is not mere dicta. To the contrary, it is an authoritative pronouncement on the scope of a criminal defendant's Sixth Amendment right to be present at trial, based on *Diaz*'s apprehension of that right at common law. Thus, although *Diaz* affirmed the defendant's conviction because he left after the trial had begun, given that Court's clear intent to make the Constitutional right to be present at trial as broad as the right at common law, his conviction certainly would have been reversed had he left before the trial.

In the second case, *Brown*, the Third Circuit says that Rule 43's "initially present" language has no special significance and need not be followed. *Brown* reasons that if the Rule gives a defendant the ability to waive his presence after the trial begins, and thereby to miss crucial portions of the trial, it does not make sense to

interpret the Rule to prevent him from waiving his presence at the beginning, when what it viewed as less important events, such as jury selection, occur.

Brown fails to appreciate, however, that Rule 43 has its roots in the common law, which strongly disfavors trial *in absentia*. The common law decided that it would permit such trials only if the defendant left after the trial had begun in his presence, even though it was clear that a defendant could, by leaving before the trial began, prevent his trial from taking place. The common law simply made a judgment that trial *in absentia* was to be avoided, and that only when the trial had begun in the defendant's presence would the interests of finality and judicial economy in proceeding to a conclusion predominate. Thus, Rule 43's "initially present" language has less to do with the defendant's ability to waive his right to be present than it does with preventing trials *in absentia*, except in a narrow category of cases.

D. Aside from Rule 43's plain wording and its Constitutional and common law underpinnings, considerations of sound procedure and practice in the Federal judicial system require that this Court apply Rule 43 as written.

Common sense and the principles of statutory construction require that courts give effect to all portions of Rule 43, and they do not permit reading into the Rule a waiver provision concerning the right of presence far broader than the one it contains. The presence of a narrow waiver provision in the Rule presumes that a broader one was rejected.

If this Court does permit district courts to add to Rule 43 a waiver provision reaching defendants who absent themselves before trial, the results will include not only a denial of the right of presence guaranteed under the Rule and the Constitution, but a lack of uniformity in Federal judicial procedure, and possibly the denial of due process, as district courts implement *ad hoc* procedures to

determine if a defendant has voluntarily absented himself, and if he has, whether the trial should be held in his absence.

Another consideration to be kept in mind if this Court approves the engrafting of a broader waiver provision onto Rule 43 is the likelihood that doing so will encourage similar departures from, or expansions upon, other procedural rules. The disregard some Federal courts have shown for Rule 43 is particularly troublesome because nothing in this Court's jurisprudence would have suggested to them that the Rule's limitation on *in absentia* trials could be disregarded.

Whether or not Rule 43 continues to find support in the Constitution, violations of the Rule should be remedied by the exercise of this Court's supervisory authority over the Federal courts. Exercising that authority in this case will avoid the problems, discussed above, that have arisen, or likely will arise, owing to the failure of some courts to follow the plain wording of the Rule.

E. Where a Rule 43 violation results in the defendant not being present at any stage of his trial, which is what happened in the Petitioner's case, so fundamental a right has been lost that no prejudice need be shown. If it does, the test is whether the defendant's absence was harmless error beyond a reasonable doubt. Here, the Government portrayed Petitioner as the central figure in the fraud scheme, most of the evidence in the case related to him, and a co-defendant took advantage of his absence by questioning Petitioner's brother about it, and then arguing that the absence was evidence of guilt. His absence also meant that he could not participate in the selection of the jury and confront his accusers. The prejudice thus attendant to trying the Petitioner *in absentia* cannot, on these facts, be considered harmless error beyond a reasonable doubt.

F. Upholding Rule 43 will safeguard the Constitutional and common law rights upon which the Rule is

based, but whether or not this Court finds that the Constitution continues to prohibit the trial *in absentia* of a defendant not initially present, Rule 43's prohibition against such trials simply cannot be ignored. If this Court deems the Rule to be unworkable in today's Federal judicial system, the Rule can be changed. Until then, it must be followed.

ARGUMENT

FEDERAL RULE OF CRIMINAL PROCEDURE 43 AND THE CONSTITUTION DO NOT PERMIT THE TRIAL *IN ABSENTIA* OF A DEFENDANT WHO IS NOT PRESENT AT THE BEGINNING OF HIS TRIAL.

A. The plain wording of Rule 43 prohibited the district court from trying the Petitioner *in absentia* because the Rule expressly limits waiver of the right to be present to defendants who are "initially present" at trial.

The District Court should not have tried Petitioner in his absence because he was not initially present when the trial began, as required by Federal Rule of Criminal Procedure 43. Because the entire Rule is set out at pages 2-3 of this brief, we quote below the most pertinent section:

> (b) Continued presence not required. The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, *initially present*,
>
> > (1) is voluntarily absent *after* the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial) . . . (emphasis added).

The Rule plainly requires a defendant's presence at the outset of the trial as a condition of trying him in his later

absence.[3] The Petitioner was never present at any stage of his trial, and his counsel objected to a trial *in absentia* (J.A. 7, 15, 39).

The language in Rule 43(b) stating that a defendant who voluntarily absents himself must have been initially present before the trial can proceed in his absence is not surplusage or the result of inadvertence on the part of the Rule's Drafters. Paragraph 2 of the original Advisory Committee Note to Rule 43 says:

> The second sentence of the Rule is a restatement of existing law that, except in capital cases, the defendant may not defeat the proceedings by voluntarily absenting himself *after the trial has been commenced in his presence, Diaz v. United States*, 223 U.S. 442, 455 . . . [1912]; *United States v. Noble*, 294 Fed. 689 (D. Mont. [1923])—*affirmed*, 300 Fed. 689 C.C.A. 9th [1924]; *United States v. Barracota*, 45 F.Supp. 38, S.D.N.Y. [1942]; *United States v. Vasalo*, 52 F.2d 699, E.D. Mich. [1931] (emphasis added).

This Court made changes to Rule 43 in 1974, the most significant of which was to incorporate its holding in *Illinois v. Allen*, 397 U.S. 337 (1970) permitting a trial court to remove an unruly defendant.[4] However, the portion of the Rule with which we are concerned, paragraph (b) and subparagraph (b)(1)'s limitation on trials *in absentia* to defendants "initially present," still reads, for practical purposes, just as it did before 1974.[5]

---

[3] For purposes of Rule 43, trial begins with impaneling the jury. See, *Rogers v. United States*, 422 U.S. 34, 39 (1975) and *United States v. Crutcher*, 405 F.2d 239, 242 (2nd Cir. 1968), *cert. denied*, 394 U.S. 908 (1969).

[4] Another change removed the limitation on *in absentia* trials to non-capital trials. See, 8B *Moore's Federal Practice*, Section 43.01[1] (2d ed. 1980).

[5] According to C. Wright, *Federal Practice and Procedure*, Section 721, 5 at n. 1 (1982), prior to 1974 the Rule read as follows:

B. Rule 43's origins in the Constitution and the common law leave no doubt that the Rule does not permit the trial *in absentia* of a defendant not initially present.

The Drafters of Rule 43 relied on and incorporated *Diaz v. United States*, 223 U.S. 442 (1912) because it stated the existing law on the permissibility of trial *in absentia*. See *Taylor v. United States*, 414 U.S. 17, 19 (1973). Defendant Diaz had been charged in the Philippines with non-capital murder. Twice during his trial he voluntarily left, each time expressly waiving the right of presence granted him under Philippine statutes, Sections 3270, 3271, 3280, and 3296, which required a defendant's presence at a plea of guilty and judgment, and which entitled a defendant to be present at every other stage of the proceedings. 223 U.S. at 453. The issue on appeal was not whether Diaz had voluntarily waived his right of presence or had been denied any right of confrontation, but whether he could even waive his right to be present, and if he could not, whether his absence meant that the trial court lacked the power to proceed. *Id.*

To decide this question, this Court looked to Section 5 of the Philippine Civil Government Act, which granted a criminal defendant "the right to be heard by himself and counsel . . . ." 223 U.S. at 454. According to *Diaz*, if

---

The defendant shall be present at the arraignment, at every stage of the trial including the impaneling of the jury and return of the verdict, and at the imposition of sentence, except as otherwise provided by these rules. ***In prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict.*** A corporation may appear by counsel for all purposes. In prosecutions for offenses punishable by fine or imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence. The defendant's presence is not required at a reduction of sentence under Rule 35 (emphasis added).

this portion of the Act made a defendant's presence indispensable, it made no difference that the Philippine statutes mentioned above permitted a waiver of the entitlement to presence because the Act's constitutional status made it superior to the statutes. *Id. Diaz* then said that because Section 5's "right to be heard by himself and counsel" is similar to the right to be present at trial guaranteed by the Sixth Amendment to the United States Constitution, and because the Act was intended to embody and to carry to the Philippines the Constitutional rights to which United States citizens were entitled, it would interpret Section 5 for the Philippines just as it had interpreted the Sixth Amendment right of presence for the United States. *Id.* at 455.

The *Diaz* Court then reviewed American law concerning trial *in absentia* to determine if the Sixth Amendment permitted a waiver of the right of presence. It concluded that the prevailing rule at common law was:

> . . . that if, after the trial has begun in his [the defendant's] presence, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial . . . ."

223 U.S. at 455 (citations omitted). After defining the Sixth Amendment right of presence by reference to the common law rule, *Diaz* next applied Section 5 of the Act in the way the Sixth Amendment and the common law had been applied in the United States, that is, to permit a waiver of the right of presence in the case of a defendant who, initially present at his trial, voluntarily absents himself. *Id.* Thus, Defendant Diaz's departure after the beginning of his trial no more deprived the trial court of the power to proceed than would have a like departure by a defendant in an American court.

Significantly, *Diaz* expressly recognized the problem that defendants who absent themselves can create for the judicial system, but it did not allow this to modify what it recognized as a clear-cut rule, namely, that a trial

actually pending before a jury may proceed as to an absent defendant only if he was initially present:

> Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted an escape from prison, or an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458, quoting *Falk v. United States*, 15 App. D.C. 446, 460-61 (1899), *cert. denied*, 181 U.S. 618 (1901).

Though *Falk* strongly condemns a defendant's absenting himself from trial, there is no question that it did not even contemplate the possibility of proceeding with the trial of a defendant who leaves before his trial begins. To begin with, *Falk* involved a defendant who was present when his trial began. 15 App. D.C. at 450. Furthermore, *Falk* specifically said that:

> It does not seem to us to be consonant with the dictates of common sense that an accused person, being at large upon bail, should be at liberty, whenever he is pleased, to withdraw himself from the courts of his country and to break up a *trial already commenced*.

Id. at 454 (emphasis added).

Up to this point, we have focused primarily on Rule 43's origins in the common law and the Sixth Amendment. This Court had occasion to allude to these sources of the Rule in *Illinois v. Allen*, 397 U.S. 337, 338 (1970), where it said: "One of the most basic rights guaranteed by the Confrontation Clause is the accused's right to be present in the courtroom at every stage of his trial," citing *Lewis v. United States*, 146 U.S. 370 (1892). However, Rule 43's limitation on trial *in absentia* has origins in other parts of the Constitution, as well as in non-Constitutional principles.

The Constitution contains also a due process right of presence. In *Snyder v. Massachusetts*, 291 U.S. 97 (1934), which decided that a defendant did not have a Constitutional right to be present when the jury viewed the scene of the alleged crime, this Court held that a defendant has a right to be present

> . . . under the Fourteenth Amendment . . . whenever his presence has a relation, reasonably substantial, to the fullness of his opportunity to defend against the charge.

Id. at 105-06. In *Faretta v. California*, 422 U.S. 806, 819 n. 15 (1975), this Court cited *Snyder v. Massachusetts* for the same proposition.

Snyder and *Faretta* involved State court defendants, but in *United States v. Gagnon*, 470 U.S. 522, 526 (1985), this Court applied a Fifth Amendment due process right of presence to a Federal defendant. *Gagnon* involved an *in camera* hearing, held to address a juror's concern about the defendant's in-court behavior, that did not include the defendant. Although this Court found that the defendant had a right to be present, he was deemed to have waived it because the record showed that he was present at trial, knew about the hearing, and made no request to attend and no objection. *Id.* at 528.

The right of presence preserved in Rule 43 also finds support in what this Court has termed "the rule of orderly conduct of [a] jury trial." In *Shields v. United States*, 273 U.S. 583, 588-89 (1927), a trial court received a communication from the jury and responded to it, all out of the presence of the defendant. *Id.* at 584. *Shields* said that this rule of orderly conduct entitled the defendant "to be present from the time the jury is impaneled until its discharge after rendering the verdict." *Id.* at 589.

Because of the many and varied sources giving rise to the Rule, it is often spoken of as being broader than the

Constitutional right of presence. *United States v. Alessandrello*, 637 F.2d 131, 138 (3rd Cir. 1980), *cert. denied*, 451 U.S. 949 (1981); *United States v. Brown*, 571 F.2d 980, 986 n. 5 (6th Cir. 1978). There can be no doubt that Rule 43 does not permit the trial *in absentia* of a defendant not initially present, and was never intended to.[6]

C. Courts holding that a defendant not initially present for his trial may be tried in his absence misconstrue *Diaz v. United States* and Rule 43.

Despite Rule 43's clear prohibition against trying *in absentia* a defendant who is not initially present, a significant number of Federal Circuit Courts have affirmed

[6] It may seem surprising, given Rule 43's plain language, that no case involving trial of a defendant not initially present has resulted in a reversal. The Rule 43 case closest on its facts to Petitioner's case is *United States v. Hudson*, 313 F.Supp. 422 (D.C. Del. 1970), which involved a proceeding to set aside a forfeiture of a bail bond occasioned by a defendant's failure to appear for trial. The district court responded to the bondsman's contention that the court could have tried the defendant *in absentia* by pointing out that Rule 43 would have prohibited that. 313 F.Supp. at 426. Although we have not found a case that directly involves, and which reverses, a trial court's decision to try *in absentia* a defendant not initially present, many cases have discussed or mentioned approvingly the language in Rule 43(b)(1) limiting trial *in absentia* to only such defendants, even though the cases themselves involve defendants who left after their trials had begun. See, *Pearson v. United States*, 325 F.2d 625, 627 (D.C. Cir. 1963); *Cross v. United States*, 325 F.2d 629, 631 (D.C. Cir. 1963); *Cureton v. United States*, 396 F.2d 671, 675 (D.C. Cir. 1968); *United States v. Miller*, 463 F.2d 600, 603 (1st Cir.), *cert. denied*, 409 U.S. 956 (1972); *Government of the Virgin Islands v. George*, 680 F.2d 13, 15 (3rd Cir. 1982); *Parker v. United States*, 184 F.2d 488, 489 (4th Cir. 1950); *United States v. Hernandez*, 842 F.2d 82, 84 (5th Cir. 1988); *United States v. Garcia-Turino*, 458 F.2d 1345, 1346 (9th Cir. 1972). Cases have, of course, held that it is permissible to try a defendant who is not initially present, see footnote 7, *infra*, but the absence of contrary cases does not mean that courts have never applied Rule 43 to preclude trial *in absentia* on facts such as Petitioner's. If a court follows the Rule when the defendant does not appear, the trial does not take place and no appealable issue arises.

convictions obtained in trials where the defendant did not initially appear, or was absent for the entire trial.[7] Two of the earliest and most-cited of these cases are *United States v. Peterson*, 524 F.2d 167, 184 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976), in which the Fourth Circuit disregarded the "initially present" language of Rule 43 to find a waiver of the right of presence, and *Government of the Virgin Islands v. Brown*, 507 F.2d 186, 189 (3rd Cir. 1975), where the Third Circuit held that a defendant who knew when his trial was to begin, but who missed jury-selection, had waived his Constitutional and Rule 43 rights of presence. These cases are significant not only because many of the cases permitting trial *in absentia* of defendants not initially present cite them,[8] but because the Eighth Circuit Court of Appeals expressly adopted their reasoning to find that the Petitioner had waived his right to be present (J.A. 57-59).

We first examine the decision in *United States v. Peterson*. *Peterson* recognized that the requirement in Rule 43 that the defendant be "initially present" came from *Diaz v. United States*, but it got around the Rule by distorting *Diaz*'s statement that the Sixth Amendment and the common law permit trial *in absentia* only of a defendant initially present. *Peterson* said:

> In speaking of a defendant's voluntary absence 'after the trial has begun,' the *Diaz* court was referring

[7] The defendants in the following cases were not present for any portion of their trial, and the various Circuit Courts upheld the trial courts' decisions to proceed *in absentia*: *United States v. Sanchez*, 790 F.2d 245, 249 (2nd Cir.), *cert. denied*, 479 U.S. 989 (1986); *Government of the Virgin Islands v. Brown*, 507 F.2d 186, 189 (3rd Cir. 1975) (defendant appeared in the afternoon of the first day of trial); *United States v. Peterson*, 524 F.2d 167, 184 (4th Cir. 1975), *cert. denied*, 423 U.S. 1088 (1976); *United States v. Powell*, 611 F.2d 41, 42 (4th Cir. 1979); *United States v. Muzevsky*, 760 F.2d 83, 84 (4th Cir. 1985); *United States v. Shockett*, 753 F.2d 336, 340 (4th Cir. 1985); *United States v. Houtchens*, 926 F.2d 824, 826 (9th Cir. 1991); *United States v. Wright*, 932 F.2d 868, 879 (10th Cir. 1991).

[8] See the cases cited in footnote 7.

> merely to the factual context in which that particular defendant's voluntary waiver occurred—*i.e.*, after the commencement of his trial.

524 F.2d at 184.

Because the precise issue on appeal in *Diaz* was whether the defendant had the ability under the Philippine statutes to waive his presence, and if he did not, whether his absence deprived the trial court of the power to proceed, *Diaz* did not explicitly state that its decision to affirm the defendant's conviction rested on his leaving after the trial had begun instead of before. However, considering *Diaz*'s authoritative statement that the Sixth Amendment and the common law permit a trial *in absentia* only if the defendant leaves after his trial begins, 223 U.S. at 454-55, if the defendant had left before the trial his conviction certainly would have been reversed.

To lend additional support to its decision, *Peterson* further misconstrues *Diaz*. *Peterson* says that the Philippine *statutes* are the substantial equivalent of the Sixth Amendment right to be present at trial. 524 F.2d at 184. *Peterson* then asserts that because the statutes did not *require* the defendant's presence at the trial, then neither does the Sixth Amendment, so that by implication the right of presence of which *Diaz* spoke, and incorporated in Rule 43, does not prevent a defendant's voluntary absence at the start of trial from serving as a waiver of the right to be present. *Id.*

Peterson's reasoning is wrong because it misreads the *Diaz* opinion. What *Diaz* actually says is that it is the Philippine *constitutional provision*, Section 5 of the Civil Government Act, not the statutes, that substantially equates to the Sixth Amendment right of presence. 223 U.S. at 454-55.[9] In trying to define the Sixth Amend-

[9] The relevant portion of the *Diaz* opinion says:

> We are thus brought to the question whether the provision in [Section] 5 of the Philippine civil government act, securing to the accused in all criminal prosecutions 'the right to be heard by himself and counsel,' makes his presence indispensable at every stage of the trial, or invests him with a right which he is always free to assert, but which he may also waive by his voluntary act. Of course, if that provision makes his presence thus indispensable, it is of no moment that the Philippine laws do not go so far, for they cannot lessen its force or effect. An identical or similar provision is found in the Constitutions of the several states, and its substantial equivalent is embodied in the 6th Amendment to the Constitution of the United States. It is the right which these constitutional provisions secure to persons accused of crime in this country that was carried to the Philippines by the congressional enactment, and, therefore, according to a familiar rule, the prevailing course of decision here may and should be accepted as determinative of the nature and measure of the right there (citation omitted).

223 U.S. at 454-55. There is no doubt that the "provision in [Section] 5" is the "identical . . . provision found in the Constitutions of the several states, and its substantial equivalent . . . embodied in the Sixth Amendment . . . ." *Id.*

ment by what the Philippine statutes said, *Peterson* turned *Diaz* on its head, since the whole point of *Diaz*'s analysis was to define the Civil Government Act by reference to the Sixth Amendment. The conclusion *Peterson* tries to draw concerning the scope of the right of presence discussed in *Diaz* finds no support in *Diaz*'s text.

Peterson has in effect superimposed on Rule 43 a provision for waiver of the right of presence broader than the one written into it, but the specious reasoning to which it resorts in the process (unfortunately followed by many courts), really just masks an effort to circumvent a Rule it knows was designed to prevent the trial *in absentia* of a defendant not initially present. This may be expedient, but it is not the law.

The Third Circuit's decision in *Government of the Virgin Islands v. Brown*, which the Eighth Circuit also relied on, is just as inaccurately reasoned as is *United States v. Peterson*. The Eighth Circuit, however, agreed with *Brown* (J.A. 58-59) that Rule 43's "initially pres-

ent" limitation merely paraphrased the holding in *Diaz*, and that no special significance should attach to it because, in the *Brown* court's words, there are no

> talismanic properties which differentiate the commencement of a trial from later stages. It would be anomalous to hold that a defendant cannot waive his right to be present during the period of often routine voir dire questioning but can waive that right during the time when witnesess against him are presenting crucial evidence.

507 F.2d at 189. *Brown* says that presence at the beginning of trial, as used in Rule 43, would have significance only if the defendant did not know when his trial was to begin. *Id.*

Brown's analysis misses the point, but for a different reason than did *Peterson*'s. The reason *Diaz* and the cases it cited used the defendant's presence at the beginning of trial to mark the point at which a waiver of presence may occur has less to do with formalistic distinctions than it does with the balancing process the common law developed to determine when a criminal defendant's interest in being present at his trial is outweighed by the justice system's interest in being able to function and complete its work. A careful review of *Diaz* and the early State and federal cases it cites is persuasive that the common law struck a balance between its strong desire to avoid trial *in absentia*, which has always been disfavored in this country, see *United States v. Alikpo*, 944 F.2d 206, 209 (5th Cir. 1991), and the practical consideration that a trial in progress ought to proceed to a conclusion even if the defendant absents himself.

As for a review of *Diaz*, the preceding discussion in Parts A and B of this brief leaves no doubt as to how it interpreted the Constitutional and common law right of presence.[10] Illustrative of how the lower federal courts

[10] See also, *Lewis v. United States*, 146 U.S. 370, 372 (1892), which, relying on the common law, said that "after indictment, nothing shall be done in the absence of the prisoner . . ." and that it "is not in the power of the prisoner . . . to waive the right to be personally present during the trial." *Lewis* reversed a defendant's conviction because challenges to the jurors had been made before he was present. *Diaz* actually represents a more restrictive view of the right of presence than does *Lewis* because *Diaz* interprets the Constitution and the common law to permit a waiver of that right if the defendant leaves after the trial begins.

early-on interpreted the right of presence is *Falk v. United States*, discussed at page 16 of this brief. Other significant Federal cases are cited in the Advisory Committee Note to Rule 43, quoted at page 13 of this brief. The many State cases cited in *Diaz*, 223 U.S. at 455-56, serve to confirm that *Diaz*, and hence Rule 43, prohibit the trial *in absentia* of a defendant not initially present. We cite here, and quote briefly, some of those cases: *Sahlinger v. People*, 162 Ill. 241, 246 (1882) (". . . where a prisoner after a trial has begun, wrongfully and voluntarily abandons the courtroom . . . he must be regarded as having waived a right which is guaranteed to him."); *State v. Perkins*, 40 La. Ann. 210, 212, 3 So. 647, 648 (1888) (". . . if the trial is once commenced and the prisoner, of his own wrong leaves the court, he abandons his case to the management of counsel . . . [and] the proceedings will not be stayed."); *Gore v. State*, 52 Ark. 285, 286, 12 S.W. 564, 565 (1889) ("if he escapes from custody after the trial has commenced, or if on bail shall absent himself during the trial, the trial may either be stopped or progress to a verdict . . . .").

For purposes of determining the meaning of Rule 43's "initially present" limitation, then, the commencement of trial, at common law and in *Diaz*, does not have a significance *per se*, much less a "talismanic" property. Nor does the function that presence at trial serves as proof that the defendant knows about the trial seem to be the main concern of the common law, as important as presence is in ensuring that if the defendant departs, he knows his trial is taking place. The common law instead views the beginning of trial as the point in the prosecu-

tion at which a defendant's later, voluntary absence permits other considerations facing the court, among them finality and judicial economy, to predominate and to allow the trial to proceed to a conclusion. It obviously came as no surprise to any court that gave effect to the common law rule concerning trial *in absentia* that one of its drawbacks was to permit a defendant to put off his day in court, and possibly to frustrate the ends of justice. However, as *Diaz* and the cases it cites plainly imply, 223 U.S. at 455-56, the rule represents the high value which the American justice system places on having a defendant present at his trial.

Because the reasoning underlying *Peterson* and *Brown*, the most important of the cases supporting the Eighth Circuit's interpretation of Rule 43, lacks support in logic and in the law, this Court should enforce Rule 43 as it is written and not permit the lower Federal courts to circumvent it by judicially engrafting onto the Rule a waiver provision that contradicts its letter and spirit.

D. Aside from Rule 43's plain language and its Constitutional and common law underpinnings, considerations of sound procedure and practice in the Federal judicial system require that this Court apply Rule 43 as written.

We began this brief with the argument that Rule 43's plain wording prohibited the trial court from proceeding with Petitioner's trial because he was not "initially present." We then demonstrated the Rule's solid grounding in the common law and the Constitution, as evidenced by this Court's decision in *Diaz v. United States*, and other cases. We now return to our opening premise, that the Rule's plain language must be given effect, but we argue it from a different perspective, namely, that considerations of procedure and practice in the Federal judicial system, to which this Court as the system's supervisory authority necessarily must be attentive, require the Rule to be applied as written. This argument will demonstrate that even if the Constitutional and common law concerns

that brought about Rule 43 are no longer deemed valid, or if the Petitioner could somehow be considered to have waived his Constitutional right of presence, Rule 43 standing by itself must be given effect.[11]

Common sense and the principles of statutory construction are two practice-oriented considerations applicable here. A common sense canon of construction is that a statute should not be interpreted to render one part inoperative. *Colautti v. Franklin*, 439 U.S. 379, 392 (1979). In construing a statute, a court is moreover obliged to give effect, if possible, to every word. *Reiter v. Sonotone Corporation*, 442 U.S. 330, 339 (1979). These cases thus mandate that courts give effect to the part of Rule 43 that requires a defendant to be "initially present."

Another relevant principle of construction is that when a law or rule-making body lists certain exceptions to a general prohibition, additional exceptions are not to be implied in the absence of a contrary intent. *Andrus v. Glover Construction Company*, 446 U.S. 608, 616-17 (1980). This principle embodies the Latin phrase "*expressio unius est exclusio alterius.*" See, *United States v. Jones*, 567 F.2d 965, 967 (10th Cir. 1977) (interpreting Federal Rule of Criminal Procedure 54). As applied to the Petitioner's case, this principle precludes what the Third and Fourth Circuits did in *Government of the Virgin Islands v. Brown* and *United States v. Peterson*, cited previously, which was to superimpose a waiver provision on Rule 43(b) to permit trial *in absentia* in the case of a defendant not initially present. Rule 43, though, already contains a waiver provision, which says that

> . . . the defendant shall be considered to have waived the right to be present whenever a defendant, initially

[11] See, *United States v. Songer*, 842 F.2d 240, 242 (10th Cir. 1988) (Defendant's *in absentia* sentencing constituted a violation of Rule 43 independently of any Constitutional error).

present (1) is voluntarily absent after the trial has commenced . . . .

Obviously, since the Drafters of Rule 43 contemplated the concept of waiver, and gave it expression in the form of the above-quoted portion of the Rule, the absence of a far-broader waiver provision, such as the one devised in *Peterson* and in *Brown*, must be presumed to have been intentional on the Drafters' part.

If this Court does permit to stand what some Federal district courts and Circuit Courts of Appeal have done in superimposing a waiver provision onto Rule 43 to permit trial *in absentia* of defendants not initially present, the results will include not only a denial of the right of presence guaranteed under the Rule and the Constitution (and on a far broader scale than has occurred to date), but a lack of uniformity in Federal procedure, and possibly the denial of due process. For example, because Rule 43 does not contemplate that a defendant not initially present can waive his right to be present, it establishes no procedure for determining if such a defendant *is* voluntarily absent. Therefore, trial courts have had, and will have to, devise procedures to decide whether a defendant who does not appear for trial has knowingly and voluntarily waived his right of presence.

The courts that have decided that it is permissible to try a defendant who does not initially appear, and which are cited in footnote seven at page 19 of this brief, did not hold evidentiary hearings to determine if the defendant voluntarily absented himself. They instead satisfied themselves with making an informal inquiry into the defendant's whereabouts. In fact, in one of the cases, *Government of the Virgin Islands v. Brown*, 507 F.2d at 187, the trial court waited only moments after the defendant was supposed to have appeared before proceeding, and in another, *United States v. Sanchez*, 790 F.2d 245, 250 (2nd Cir. 1986), the trial court, although it waited a day before proceeding, apparently relied solely on the defendant's attorney's statement that there was no evidence

of where the defendant was in deciding that the trial should proceed. In a case not cited in footnote seven, *United States v. Mera*, 921 F.2d 18 (2nd Cir. 1990), the trial court held an evidentiary hearing, but decided that it was not necessary that the absent defendant even have known of the trial date to justify proceeding! 921 F.2d at 20-21. *Mera* deemed it sufficient that the defendant had attended the arraignment and knew of the proceedings against him. *Id.* Some Circuit courts have reversed when a trial court failed to conduct an adequate inquiry into a defendant's absence. See, *United States v. Hernandez*, 873 F.2d 516, 519 (2nd Cir. 1989) and *United States v. Camacho*, 955 F.2d 950, 954 (4th Cir. 1992). These cases, however, only highlight the lack of uniformity in the Federal courts caused by the failure to follow Rule 43 as it is written.

Not only do the Federal courts lack any uniform, mandatory procedure for determining when a defendant has absented himself, once they make this finding, there is no uniform standard they can apply to decide whether the trial should in fact proceed. A test originating in one of the early cases involving a defendant who absented himself, *United States v. Tortora*, 464 F.2d 1202 (2nd Cir. 1972), *cert. denied*, *Savtoro v. United States*, 409 U.S. 1063 (1972), has achieved currency among courts that permit a defendant who has not appeared to be tried *in absentia*. (In the Petitioner's case, the trial court and the Eighth Circuit cited *Tortora*. (J.A. 37, 59-60). *Tortora* says that before proceeding with a trial *in absentia*, a court should weigh a complex of issues, including the likelihood that the trial can soon take place with the defendant present, the difficulties attendant to rescheduling the trial, especially multi-defendant trials, and the burden on the Government and the witnesses in having two trials. *Id.* at 1210.

Courts that apply the *Tortora* test have, however, diverged on how much discretion it gives the trial judge.

According to *United States v. Sanchez*, cited above, the test confers "broad discretion." 790 F.2d at 250. In *United States v. Hernandez*, 842 F.2d 82, 85 (5th Cir. 1988), though, the Fifth Circuit applied the identical factors discussed in *Tortora*, but held that in applying them a trial court has only "narrow discretion" to proceed with the trial when the defendant is not initially present.

The lack of uniform, mandatory procedures and standards for determining when a defendant has absented himself is understandable, especially considering that the Federal trial and appellate courts are operating outside Rule 43 when they permit the trial of a defendant not initially present, but this does not make it acceptable. Letting the lower Federal courts fashion procedures and standards on an *ad hoc* basis will only lead to divergent practices and a lack of uniformity in the Federal system. Moreover, in certain cases it will result in the denial of procedural due process to defendants, as occurred in the *Mera* case, where the court did not even find it necessary to establish the defendant's knowledge of the trial date before ordering his trial to proceed.

Another practice-related issue presented by the Petitioner's case is that if this Court affirms the increasingly common practice of ignoring Rule 43's limitation on *in absentia* trials, it will be encouraging courts to make departures from, or to engraft exceptions onto, other Rules. The Federal courts' treatment of Rule 43 should be especially disturbing, not only because those courts are not following a rule promulgated by this Court, but because nothing this Court has written would have suggested to them that ignoring Rule 43's limitation on *in absentia* trials would be permissible. A brief review of this Court's Rule 43 cases establishes this.

In *Illinois v. Allen*, cited earlier, this Court addressed the problem of the defendant who is present at trial but whose conduct is disruptive, holding that such a defendant waives his rights of presence under the Constitution

and Rule 43. 397 U.S. at 343. This Court again encountered Rule 43 in *Taylor v. United States*, 414 U.S. 17 (1973), which involved a defendant who absented himself after the trial had begun. *Taylor* said that the case presented no claim that Rule 43 had prohibited the *in absentia* trial because the Rule expressly provides for the continuation of a trial begun in the defendant's presence. 414 U.S. at 18. *Taylor* quoted approvingly, however, the portion of the opinion in *Diaz v. United States* stating that if the accused absents himself after the trial has begun in his presence, the trial may proceed, and said that Rule 43 reflected this long-standing rule. *Id.* at 19. *Rogers v. United States*, 422 U.S. 37 (1975) said that a court violated Rule 43 when it received and answered a note from a deliberating jury without notifying the defendant or his attorney. This Court remanded for a new trial. 422 U.S. at 39. In *United States v. Gagnon*, 470 U.S. 522, 528 (1985), discussed earlier, this Court found that questioning a juror outside a defendant's presence violated Rule 43, but that the defendant's knowing failure to object waived the issue.

Because none of these cases gives even a hint that Rule 43's limitation on trial *in absentia* to defendants initially present should not be enforced, this Court should be concerned about how faithfully the lower Federal courts will follow other rules. If trial and appellate courts now presume to ignore a plainly-worded rule, and do it without any indication from this Court that it would condone the practice, it is likely that those courts will in the future expect a certain freedom to apply or ignore rules, as they wish.

The preceding paragraphs have discussed the procedural and practical reasons why Rule 43 should not be violated. When a prejudicial violation of a Federal Rule of Criminal Procedure occurs, this Court may exercise its supervisory authority over the lower Federal courts to remedy it. See, *Bank of Nova Scotia v. United States*, 487 U.S. 250, 255 (1987). It should do so here. This

will prevent the problems that have arisen, and which may in the future arise, as a result of some courts' disregard of Rule 43.

E. Petitioner's absence from the trial was not harmless error.

We have established that the district court erred in trying the Petitioner *in absentia*, but a question remains as to prejudice. Normally, an appellant must show that the error complained of affected a substantial right. See Federal Rule of Criminal Procedure 52(a). This Court has said that the prejudice resulting from a Rule 43 violation can in some circumstances be a harmless error, *Rogers v. United States*, 422 U.S. 34, 40 (1975), as have the lower Federal courts, *United States v. Crutcher*, 405 F.2d 239, 244 (2nd Cir. 1968), *cert. denied*, 394 U.S. 908 (1969) and *Blackwell v. Brewer*, 562 F.2d 596, 600 (8th Cir. 1977). This implies that in most instances of a Rule 43 violation, the error cannot be harmless.

The right of presence, whether founded in the Constitution, common law, or Rule, is so fundamental that a defendant's absence from an *entire* trial should never be treated as harmless error. See, *Chapman v. United States*, 386 U.S. 18, 23 (1967) ("Our prior cases have indicated that there are some Constitutional rights so basic to a fair trial that their infraction can never be treated as harmless error"), and *Rushen v. Spain*, 464 U.S. 114, 17 n. 2 (1983) (Deprivation of the right of presence is subject to a harmless error analysis unless by its very nature the deprivation could not have been harmless). Conducting just the jury selection in the defendant's absence has been deemed so serious a breach of the right of presence as to make application of the harmless error test unnecessary. *United States v. Crutcher*, 405 F.2d at 244. In the Petitioner's case, because the Rule 43 violation resulted in his absence from the entire trial, no showing of prejudice should be required.

In any event, the facts of the Petitioner's case disclose that conducting the trial in his absence was not harmless error beyond a reasonable doubt. To begin with, the Government described the Petitioner to the jury as the most culpable defendant. In the Government's opening statement, the prosecutor said that the Petitioner was the "kingpin of the fraud scheme . . . ." (Tr. Vol. IV, 194). A large portion of the Government's proof consisted of witnesses testifying that they had bought medallions or investment certificates directly from the Petitioner (Tr. Vol. V, 501; Vol. VI 612; Vol. VII 886-87, 910; Vol. VIII 1004, 1045). One of the Government's key witnesses, an attorney from the Minnesota Department of Commerce, testified that he asked the Petitioner for documentation substantiating his fund-raising efforts b[illegible] that he never furnished it (Tr. Vol. X, 1515). A Postal Inspector testified that the Petitioner received the lion's share of the corporate funds (Tr. Vol. XII 1765-69). The Government also offered evidence that the Petitioner personally transacted many of the fund-raising effort's business operations (Tr. Vol. IX, 1339, 1349).

One of the Petitioner's co-defendants seized upon his absence to shift responsibility to him. Just after the court read into the record its findings and conclusions concerning trial *in absentia* (J.A. 41-45), it said that it did not want anyone to refer to the Petitioner's absence. (*Id.* at 45). Co-defendant Cheatham's counsel took exception to this ruling (*Id.*), and once the trial began, the trial court did permit the attorneys for the co-defendants to bring up the absence (Tr. Vol. V, 437). Cheatham's counsel, for example, asked the Petitioner's brother Philip, a former co-defendant who had made a deal to testify, if he knew where his brother was and if his brother knew he was supposed to be at the trial (Tr. Vol. V, 440-43). The Petitioner's counsel objected but was overruled (*Id.* at 438). The brother responded that the Petitioner had known about the trial but that he, Philip, did not know where the Petitioner was (*Id.* at 442-43). In his closing

argument, Cheatham's counsel told the jury that the Petitioner had "skipped," which was a "cowardly move," that he was "full of sin," and that the jury "should convict him of everything" (Tr. Vol. XVIII. 2413-14).

The Petitioner's absence prejudiced him in significant other ways. Because the court tried him *in absentia*, he could not assist in the selection of jurors or the cross-examination of witnesses. The inability to confront and cross-examine goes to the heart of the Sixth Amendment right to presence, and as noted above, absence from just the jury-selection process has been found to be grounds for a new trial. *United States v. Crutcher*, 405 F.2d at 244.

Conducting Petitioner's trial *in absentia* also meant he could not testify. It is somewhat speculative to assert now that he would have, but he did say at a motions hearing held less than a week before the trial: "I welcome the opportunity to defend myself against all of these charges . . . ." (Tr. Oct. 7, 1988 hrg., 20). Whether or not the Petitioner would have testified, it seems fair to say that just his presence at trial would have put the defense in a better position to dispute the evidence relating to finances and expenditures. The accounting of corporate funds had been a demonstrable concern of the Petitioner's, as he indicated at the October 7 hearing, referred to above (*Id.* at 19-20).

The district court's decision to try the Petitioner *in absentia* violated Rule 43 and resulted in his absence from the entire trial. Under these circumstances, no prejudice need be shown, but if it does, the Petitioner's alleged central role in the fraud scheme, the efforts of a co-defendant to use Petitioner's absence as proof of his guilt, and Petitioner's inability to testify, or at least be present to help dispute the evidence offered against him, prove that the prejudice accruing from his absence was not harmless beyond a reasonable doubt.

F. If Rule 43's limitation on *in absentia* trials is no longer desirable, the Rule can be changed, but until then it must be followed.

It cannot reasonably be contended that when the Drafters of the Rules of Criminal Procedure created Rule 43, and that when this Court adopted it, no one imagined that a defendant might not appear for his trial and that the resulting application of the Rule would prevent the trial from taking place until he returned or was located. Nor can it be contended, given the Rule's origins, that such a result is an absurd or unintended one. What can be reasonably contended, although we do not agree with it, is that applying Rule 43 as written, and as it was intended to apply, may create difficulties for the Federal judicial system which, given today's higher volume of cases and their increased cost and complexity, it may not wish to tolerate. The solution to whatever problems enforcement of Rule 43 has or will create is to change the Rule, not to deny its origins and meaning. A procedure for changing the Rules of Criminal Procedure exists under 28 U.S.C. Sections 2072, 2073, and 2074. These statutes put this Court in a position to initiate and oversee changes it considers appropriate.

Amending Rule 43 to permit trial *in absentia* of a defendant not intially present would undoubtedly be challenged on Constitutional grounds, given the Constitutional dimension that this Court in *Diaz* and subsequent cases has said the right of presence possesses. This Court could use the Petitioner's case to overrule *Diaz*, but it would still be faced with the Rule's plain wording prohibiting trial *in absentia* of a defendant not initially present. As a matter of raw judicial power, this Court could simply refuse to give effect to the Rule's "initially present" language, but this obviously is to be avoided, as it would lack the support of sound legal reasoning and would invite lower courts to disregard or deliberately misconstrue inconvenient rules or statutes in the hope that this Court will either affirm them, or because of the

volume of such decisions, simply lack the capacity to review them. The fair and prudent course, then, is to enforce Rule 43 as written.

CONCLUSION

The judgment of the Court of Appeals for the Eighth Circuit should be reversed, and the Petitioner should receive a new trial.

Respectfully submitted,

MARK D. NYVOLD
(Appointed by this Court)
Suite 654, Capital Centre
386 North Wabasha Street
Saint Paul, Minnesota 55102
(612) 223-5175
Counsel for Petitioner

Supreme Court, U.S.
FILED
MAY 21 1992
OFFICE OF THE CLERK

No. 91-6194

In the Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL CROSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

MICHAEL E. O'NEILL
Attorney
Department of Justice
Washington, D.C. 20530
(202) 514-2217

QUESTION PRESENTED

Whether a federal court may try a criminal defendant in his absence when the defendant knowingly and voluntarily fails to appear for trial.

TABLE OF CONTENTS

	Page
Opinion below	1
Jurisdiction	1
Constitutional provisions and Federal Rule of Criminal Procedure involved	2
Statement	3
Summary of argument	8
Argument:	
Petitioner validly waived his right to be present when he knowingly and voluntarily failed to appear for trial	11
A. A defendant can waive his constitutional right to be present at his trial by electing not to appear	11
B. Rule 43 of the Federal Rules of Criminal Procedure does not prohibit a court from trying a defendant who knowingly and voluntarily fails to appear for trial	15
C. This Court should not adopt a rule barring the trial of a defendant *in absentia*, even when the defendant knowingly and voluntarily fails to appear for trial	19
D. The District Court properly found that petitioner knowingly and voluntarily absented himself from trial	25
Conclusion	28

TABLE OF AUTHORITIES

Cases:

Arizona v. *Hunt*, 408 F.2d 1086 (6th Cir. 1969)	21
Barnett v. *State*, 512 A.2d 1071 (Md. 1986)	22
Brewer v. *Raines*, 670 F.2d 117 (9th Cir. 1982)	21
Commonwealth v. *Felton*, 307 A.2d 51 (Pa. 1973), cert. denied, 415 U.S. 984 (1974)	22
Connecticut Nat'l Bank v. *Germain*, 112 S. Ct. 1146 (1992)	17

Cases—Continued: Page

Cureton v. *United States*, 396 F.2d 671 (D.C. Cir. 1968) 24
Diaz v. *United States*, 223 U.S. 442 (1912) ..8, 9, 11, 12, 13, 14, 17, 18
Falk v. *United States*, 15 App. D.C. 446 (1899), cert. denied, 181 U.S. 618 (1901) 9, 13, 14
Frank v. *Mangum*, 237 U.S. 309 (1915) 17
Government of the Virgin Islands v. *Brown*, 507 F.2d 186 (3d Cir. 1975) 21, 22, 23
Hopt v. *Utah*, 110 U.S. 574 (1884) 18
Hunter v. *Commonwealth*, 409 S.E.2d 483 (Va. Ct. App. 1991) 22
Illinois v. *Allen*, 397 U.S. 337 (1970) 9, 11, 12, 13, 14, 17, 20, 23, 25
Kentucky v. *Stincer*, 482 U.S. 730 (1987) 20
Lewis v. *United States*, 146 U.S. 370 (1892) 18
McCaffrey v. *State*, 577 N.E.2d 617 (Ind. Ct. App. 1991) 22
Murphy v. *State*, 555 N.E.2d 127 (Ind. 1990) 22
Snyder v. *Massachusetts*, 291 U.S. 97 (1934) 11, 15, 17
Stack v. *Boyle*, 342 U.S. 1 (1951) 14
State v. *DeWeese*, 816 P.2d 1 (Wash. 1991) 22
State v. *Galloway*, 817 P.2d 1124 (Kan. Ct. App. 1991) 22
State v. *Jackson*, 351 S.E.2d 167 (S.C. 1986) 22
State v. *Kirk*, 699 S.W.2d 814 (Tenn. Crim. App. 1985), cert. denied, 475 U.S. 1023 (1986) 22
State v. *Zavala*, 666 P.2d 456 (Ariz. 1983) 22
Tacon v. *Arizona*, 410 U.S. 351 (1973) 19
Taylor v. *United States*, 414 U.S. 17 (1973) 9, 12, 13, 14, 23
Thomas v. *State*, 586 So. 2d 282 (Ala. Crim. App. 1991) 22
United States v. *Alikpo*, 944 F.2d 206 (5th Cir. 1991) 24
United States v. *Barton*, 647 F.2d 224 (2d Cir.), cert. denied, 454 U.S. 857 (1981) 21, 26
United States v. *Camacho*, 955 F.2d 950 (4th Cir. 1992) 24
United States v. *Cheatham*, 899 F.2d 747 (8th Cir. 1990) 4

Cases—Continued: Page

United States v. *Crews*, 695 F.2d 519 (11th Cir. 1983) 21-22, 26
United States v. *Durham*, 587 F.2d 799 (5th Cir. 1979) 15
United States v. *Edmonson*, No. 90-3189 (10th Cir. May 6, 1992) 21
United States v. *Fitzpatrick*, 437 F.2d 19 (2d Cir. 1970) 15
United States v. *Gagnon*, 470 U.S. 522 (1985) 11, 15
United States v. *Hernandez*, 873 F.2d 516 (2d Cir. 1989) 24
United States v. *Houtchens*, 926 F.2d 824 (9th Cir. 1991) 21, 23
United States v. *Hudson*, 313 F. Supp. 422 (D. Del. 1970) 20, 21
United States v. *Lochan*, 674 F.2d 960 (1st Cir. 1982) 23
United States v. *Mera*, 921 F.2d 18 (2d Cir. 1990) 25, 26
United States v. *Moore*, 466 F.2d 547 (3d Cir. 1972), cert. denied, 409 U.S. 1111 (1973) 15
United States v. *Muzevsky*, 760 F.2d 83 (4th Cir. 1985) 21
United States v. *Pastor*, 557 F.2d 930 (2d Cir. 1977) 21
United States v. *Peterson*, 524 F.2d 167 (4th Cir. 1975), certs. denied, 423 U.S. 1088 and 424 U.S. 925 (1976) 21, 22, 23
United States v. *Powell*, 611 F.2d 41 (4th Cir. 1979) 21
United States v. *Sanchez*, 790 F.2d 245 (2d Cir.), cert. denied, 479 U.S. 989 (1986) 24
United States v. *Schocket*, 753 F.2d 336 (4th Cir. 1985) 21
United States v. *Tortora*, 464 F.2d 1202 (2d Cir.), cert. denied, 409 U.S. 1063 (1972) 21, 23, 24, 25
United States v. *Wright*, 932 F.2d 868 (10th Cir.), certs. denied, 112 S. Ct. 428 and 450 (1991) 21, 23
White v. *Illinois*, 112 S. Ct. 736 (1992) 20

Constitution, statutes and rules: Page

U.S. Const.:
Amend. V (Due Process Clause) 2, 8, 11, 14
Amend. VI (Confrontation Clause) 2, 8, 11, 12, 14
18 U.S.C. 1341 ..... 3, 4
18 U.S.C. 1342 4
18 U.S.C. 3146 ..... 14, 25
Fed. R. Crim. P.:
Rule 43, 18 U.S.C. at 1982 (1946) 18
Rule 43 ..... 2, 8, 9, 15, 16, 17, 18, 19, 20, 21
Advisory Committee Note on 1974 Amendment, 18 U.S.C. App. at 821 (1988) 19
Advisory Committee Notes, 18 U.S.C. at 1982 (1946) 17
Rule 43(a) 2, 15
Rule 43(b) 2, 16
Rule 43(b)(1) 2, 23
Rule 43(c) 3, 15

Miscellaneous:
1 J. Chitty, *Practical Treatise on the Criminal Law* (1847) 12
Cohen, *Trial in Absentia Re-examined*, 40 Tenn. L. Rev. 155 (1973) 14
Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, etc.* (Jan. 1973), *microformed on* CIS No. CM-4213 (Congressional Info. Serv.) 19
Goldin, *Presence of the Defendant in Rendition of the Verdict in Felony Cases*, 16 Colum. L. Rev. 18 (1916) 11
2 W. Holdsworth, *A History of the English Law*:
(4th ed. 1936) 11
(5th ed. 1942) 12
T. Plucknett, *A Concise History of the Common Law* (5th ed. 1956) 12

Miscellaneous—Continued: Page

2 F. Pollock & F. Maitland, *The History of English Law* (2d ed. 1968 reprint) 11
Starkey, *Trial in Absentia*, 53 St. John's L. Rev. 721 (1979) 23
M. Wilken & N. Triffin, *Drafting History of the Federal Rules of Criminal Procedure* (1991):
Vol. 1 16
Vol. 2 16
Vol. 3 16
Vol. 7 16

In the Supreme Court of the United States

OCTOBER TERM, 1991

No. 91-6194

MICHAEL CROSBY, PETITIONER

v.

UNITED STATES OF AMERICA

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF FOR THE UNITED STATES

OPINION BELOW

The opinion of the court of appeals (J.A. 52-69) is reported at 917 F.2d 362.

JURISDICTION

The judgment of the court of appeals was entered on September 30, 1991.[1] The petition for a writ of

---

[1] The opinion of the court of appeals was filed on October 16, 1990. J.A. 52. In that opinion, the court remanded to the district court for consideration of an issue unrelated to the issue on which this Court granted certiorari, but the court of appeals retained jurisdiction over the case. J.A. 69. While the case was pending in the district court on remand, the court of appeals denied a petition for rehearing with suggestion for rehearing en banc. J.A. 70. On September 30, 1991,

certiorari was filed on October 21, 1991, and was granted on March 2, 1992. J.A. 72. The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

CONSTITUTIONAL PROVISIONS AND FEDERAL RULE OF CRIMINAL PROCEDURE INVOLVED

The Due Process Clause of the Fifth Amendment provides: "nor shall any person * * * be deprived of life, liberty, or property, without due process of law."

The Confrontation Clause of the Sixth Amendment provides: "In all criminal prosecutions, the accused shall enjoy the right to * * * be confronted with the witnesses against him."

Rule 43 of the Federal Rules of Criminal Procedure provides:

> (a) *Presence Required.* The defendant shall be present at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, except as otherwise provided by this rule.
>
> (b) *Continued Presence Not Required.* The further progress of the trial to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, initially present,
>
> (1) is voluntarily absent after the trial has commenced (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or

---

the court of appeals issued an order affirming the judgment of the district court "nunc pro tunc to January 24, 1991." J.A. 71. While that order is somewhat ambiguous, we believe that it is appropriate in calculating the timeliness of the petition to consider the judgment of the court of appeals to have been entered on September 30, 1991.

> (2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.
>
> (c) *Presence Not Required.* A defendant need not be present in the following situations:
>
> (1) A corporation may appear by counsel for all purposes.
>
> (2) In prosecutions for offenses punishable by fine or by imprisonment for not more than one year or both, the court, with the written consent of the defendant, may permit arraignment, plea, trial, and imposition of sentence in the defendant's absence.
>
> (3) At a conference or argument upon a question of law.
>
> (4) At a reduction of sentence under Rule 35.

STATEMENT

After a jury trial in the United States District Court for the District of Minnesota, petitioner was convicted on 25 counts of mail fraud, in violation of 18 U.S.C. 1341. Co-defendants Martin Cheatham and Jack Cunningham were also convicted; co-defendant James Sannes was acquitted. Petitioner was sentenced to 20 years' imprisonment, to be followed by five years' probation. J.A. 5. He was also ordered to make restitution in the amount of $240,035. J.A. 6. The court of appeals affirmed. J.A. 52-69.

1. Petitioner and his co-defendants devised a fraudulent scheme for selling a variety of products, including silver medallions, through the mail and by telephone. The medallions were marketed as "Vets for Vets commemorative medallions," and purchasers were falsely told that a portion of the sale proceeds

would fund a memorial to war veterans. See *United States* v. *Cheatham*, 899 F.2d 747, 748-750 (8th Cir. 1990) (upholding convictions of co-defendants Cheatham and Cunningham). Purchasers were also assured that the medallions would dramatically increase in value. *Id.* at 749. Between 1986 and 1988, the defendants sold about 5900 medallions for approximately $550,000. Only about 400 medallions, however, were actually delivered to the purchasers. *Id.* at 749-750.

On April 20, 1988, a grand jury in the District of Minnesota returned an indictment charging petitioner and his co-defendants with multiple violations of the mail fraud statutes, 18 U.S.C. 1341 and 1342. After a detention hearing on June 23, 1988, petitioner posted a $100,000 bond and was released on bail. J.A. 1, 12; Pet. C.A. Br. A14.

Petitioner appeared in person for a pretrial conference on August 15, 1988, at which the district court told the parties that trial was set for October 12, 1988. J.A. 41. A month later, the clerk sent a notice to all counsel confirming that the trial would begin at 9:30 a.m. on October 12, 1988. J.A. 42.

Petitioner personally attended another pretrial conference, on September 30, 1988, at which the court again advised the parties of the October 12 trial date. At that conference, counsel for petitioner told the court that he did not object to the trial date. J.A. 2, 42.

On October 7, 1988, five days before the trial was to begin, petitioner personally appeared in court a third time for a motions hearing. J.A. 42.[2] Petitioner asked the court for permission to travel to California, claiming that he needed to retrieve some personal records to use in preparing his defense. 10/7/88 Tr. 3, 8, 15-20. The court advised petitioner that it would not postpone the October 12 trial date to accommodate petitioner's belated request. J.A. 24, 26. Petitioner assured the court that he would return in two or three days. J.A. 24. The court then granted petitioner's request to leave the State. J.A. 28-30.

2. Petitioner's attorney and his three co-defendants were present for trial on the morning of October 12, 1988, but petitioner failed to appear. Petitioner's attorney told the court that he had not been able to reach petitioner by telephone that morning, but that he had spoken with him the day before and expected him to appear. J.A. 8, 9-10. The court issued a bench warrant for petitioner's arrest and dispatched a United States Marshal to petitioner's residence. J.A. 11-12.

The court reconvened later that day. The Marshal reported that the two deputies who visited petitioner's residence that day had found it "cleaned out." J.A. 19. The Marshal also said that a neighbor had told the deputies that on the previous night petitioner had backed his car into the garage and appeared to be packing things into the trunk. *Ibid.* The court advised the Marshal to contact petitioner's family in an effort to locate him. The court then asked the parties to state their views on what should be done. Petitioner's counsel objected to a trial *in absentia*, 1 R. 35, 53, and petitioner's co-defendants moved for a continuance until petitioner could be located, 1 R.

---

[2] Although the district court did not expressly find that petitioner was present at the October 7, 1988, hearing, J.A. 42, it is clear from the transcript of that hearing that petitioner did personally attend. See, *e.g.*, 10/7/88 Tr. 2, 30. Petitioner acknowledges that he was present at the hearing. Pet. Br. 4.

41-44, 54-55. The government stated that it wanted to try the case as soon as possible, because the government had assembled a large number of witnesses, many of whom were elderly and from out of State. J.A. 23-24. The court continued the trial until Monday, October 17, 1988, but reserved decision on whether trial would go forward if petitioner had not appeared by then. J.A. 20, 35, 56.

On October 13, 1988, the court held a bond forfeiture hearing. At the hearing, the Marshal advised the court that the Marshals Service was still unable to locate petitioner. Petitioner's father, brother, and bondsman appeared at the hearing and told the court that they did not know where petitioner was. J.A. 43.

In a subsequent written order, the court granted the government's motion to proceed with the trial of petitioner and his co-defendants in petitioner's absence. J.A. 48-51. The court found that petitioner "had complete, full, and adequate notice of the charges and proceedings against him," including notice of the date on which the trial was scheduled to begin; that petitioner "deliberately, voluntarily, knowingly, and without justification failed to be present [at] the designated time and place for trial"; that there was "no reasonable probability that [petitioner] could be located shortly or that the trial could be rescheduled with [petitioner] in attendance"; that "the rescheduling of this trial would present extreme difficulty to the government, to the witnesses for the government, to defense counsel, and to the court"; and that requiring the government to try petitioner separately from his co-defendants would "impose a substantial burden upon the government, on the witnesses, and on the court." J.A. 48, 50. In connection with the last finding, the court noted that "[t]he government has listed 83 potential witnesses and in

excess, of 400 proposed exhibits for the trial," and that many of the witnesses were "elderly or infirm." J.A. 50-51. Based upon those findings, the court concluded that petitioner "voluntarily waived his constitutional right to be present during the trial," and that "[t]he public interest in proceeding with the trial in the absence of [petitioner] outweighs the interest of [petitioner] to be present during the conduct of the trial." J.A. 51.

3. The trial began on October 17, 1988. On November 18, 1988, the jury returned a verdict finding petitioner guilty on 25 counts of mail fraud. J.A. 54-55. Although petitioner was absent throughout, his counsel actively participated in the trial, presenting an opening statement and closing argument, conducting voir dire, introducing evidence and cross-examining witnesses, making objections, and arguing motions.[3] Sentencing was postponed pending petitioner's arrest.

Approximately seven months later, on June 14, 1989, petitioner was arrested in Florida. He was subsequently sentenced to four consecutive five-year terms of imprisonment on 22 of the counts, to be followed by five years' probation. The district court suspended sentencing on the three remaining counts, conditioned on petitioner's payment of $550,000 restitution to the victims of his scheme. J.A. 55. On remand following appeal, the district court reduced the amount of restitution that petitioner was required to pay to $240,035. J.A. 6, 67-69.

---

[3] See, *e.g.*, 3 R. 122-127; 4 R. 251-253, 339-358; 5 R. 438, 567-574; 6 R. 657-677; 7 R. 820-829; 8 R. 1088-1093, 1141-1143; 10 R. 1525-1557; 11 R. 1688-1726; 12 R. 1877-1878; 13 R. 1907-1927, 1933-1938, 1946-1956, 1960-1975, 1989-1991; 14 R. 2000-2016, 2026-2040; 15 R. 2060-2088, 2135-2141, 2165; 17 R. 2327-2344.

4. The court of appeals affirmed petitioner's convictions. J.A. 52-69. It rejected petitioner's argument that Fed. R. Crim. P. 43 permits a defendant to be tried *in absentia* only when the defendant absents himself after initially appearing for trial. The court determined that Rule 43 addressed the situation of a defendant who absconds after initially appearing for trial because that was the factual situation before this Court in *Diaz* v. *United States*, 223 U.S. 442 (1912). The court stated that "Rule 43 does no more than restate the holding in *Diaz*" and does not preclude the trial *in absentia* of a defendant who absconds prior to trial. J.A. 57.

The court adopted the "analysis suggested by the Second and Fourth Circuits" for determining when a district court has discretion to try a defendant who has voluntarily absconded. J.A. 61. Under that analysis, the court said that district courts should consider, among other factors, "the likelihood that the trial can take place with the defendant present, the difficulty of rescheduling, and the burden on the government and inconvenience to jurors of having to undertake two trials * * * in a multiple defendant case." *Ibid.* Considering those factors in light of the district court's findings, the court of appeals "ha[d] no difficulty" in concluding that "[petitioner] waived his right to be present at trial and that the district court acted within its discretion in trying [petitioner] *in absentia*." *Ibid.*

SUMMARY OF ARGUMENT

A. The Constitution does not prohibit a court from trying a defendant who absconds prior to trial. This Court's decisions make clear that, while a criminal defendant has a right under the Sixth Amendment and the Due Process Clause to be present at trial,

that right may be waived. The defendant may waive the right to be present not only by expressly consenting to a continuation of trial in his absence, see *Diaz* v. *United States*, 223 U.S. 442 (1912), but also by "mere voluntary absence from his trial," *Taylor* v. *United States*, 414 U.S. 17, 19 (1973) (per curiam), and by other types of misconduct, see *Illinois* v. *Allen*, 397 U.S. 337 (1970). The reasoning of this Court's decisions holding that a defendant may waive the right to be present is fully applicable in the context of this case. Those decisions make clear that the Constitution does not protect conduct by an accused that is calculated to prevent a trial from occurring "until the accused person himself should be pleased to permit it." *Diaz*, 223 U.S. at 457 (quoting *Falk* v. *United States*, 15 App. D.C. 446, 454 (1899), cert. denied, 181 U.S. 618 (1901)). A defendant who knows when his trial is to begin and deliberately fails to appear for it demonstrates total disregard for the judicial system. The Constitution does not require a court in that situation to postpone the trial until the defendant chooses to attend.

B. Rule 43 of the Federal Rules of Criminal Procedure likewise does not prohibit a court from trying a defendant in his absence when the defendant knowingly and voluntarily fails to appear for trial. The Rule simply does not address the case of a defendant who willfully fails to appear for trial. Nor does the Rule by implication forbid a court from finding a waiver of the right to be present at trial in that situation. Instead, the Rule addresses several narrower issues, including: (1) whether the defendant is required to attend his own trial (he is); (2) whether his voluntary absence after the commencement of the trial prevents the court from continuing with the trial (it does not); and (3) whether he may be excluded

from the courtroom for disruptive behavior during the trial (he may). It is not reasonable to conclude that because the Rule recognizes a waiver of the right to be present in two particular settings, it must be read to prohibit a court from finding a waiver in any other case, including the case of a defendant who never appears for trial at all. Because the Rule does not prohibit a waiver in that setting, a court should be free to apply traditional waiver principles in light of the competing interests at stake.

C. This Court should not adopt the rule urged by petitioner—that even though a defendant knowingly and voluntarily fails to appear for trial, he may not be tried *in absentia*. Such a rule would draw a sharp and unjustified distinction between a defendant who absconds shortly after the start of trial and one who fails to show up for trial at all. The lower federal courts have correctly adopted the same approach in both situations, holding that a defendant may be tried in his absence when his absence is knowing and voluntary, and when postponing the trial would impose a significant burden on the other parties, the witnesses, and the court. That approach fully protects a defendant's right to be present at trial, while also protecting the judicial process from manipulation by defendants who place a high premium on avoiding a trial.

D. Petitioner was properly tried *in absentia*. The district court found (and petitioner does not dispute) that petitioner had actual knowledge of the date on which his trial was to begin, and that he deliberately failed to appear. The court further found that postponing petitioner's trial would cause significant hardship to the government, the numerous witnesses called to testify, and the court. Based on those findings, the court properly concluded that petitioner had waived

his right to be present at his trial and that it was appropriate to conduct the trial in petitioner's absence.

ARGUMENT

PETITIONER VALIDLY WAIVED HIS RIGHT TO BE PRESENT WHEN HE KNOWINGLY AND VOLUNTARILY FAILED TO APPEAR FOR TRIAL

A. A Defendant Can Waive His Constitutional Right To Be Present At His Trial By Electing Not To Appear

The "constitutional right to presence" is rooted in both the Confrontation Clause of the Sixth Amendment and the Due Process Clause. *United States* v. *Gagnon*, 470 U.S. 522, 526 (1985) (per curiam); *Illinois* v. *Allen*, 397 U.S. 337, 338 (1970). In *Snyder* v. *Massachusetts*, 291 U.S. 97, 105-106 (1934), the Court held that a criminal defendant has a right to be present at any trial proceeding for which "his presence has a relation, reasonably substantial, to the fulness of his opportunity to defend against the charge." In cases involving felony charges, this Court has described the right to be present at trial as "scarcely less important to the accused than the right of trial itself." *Diaz* v. *United States*, 223 U.S. 442, 455 (1912).[4]

---

[4] The right of a criminal defendant to be present at his trial derives from early Anglo-Saxon law, under which tribunals refused to enter judgment on a complaint unless the accused was physically present. 2 W. Holdsworth, *A History of the English Law* 105 (4th ed. 1936); 2 F. Pollock & F. Maitland, *The History of English Law* 594 (2d ed. 1968 reprint); Goldin, *Presence of the Defendant in Rendition of the Verdict in Felony Cases*, 16 Colum. L. Rev. 18, 18 (1916). After trial by jury succeeded earlier forms of trial, the right of presence was retained, being viewed as necessary to the court's jurisdiction. 2 W. Holdsworth, *supra*, at 105. An

Like the right to a trial, however, the constitutional right to presence may be waived. In *Diaz*, the Court held that a defendant waived his right to be present during trial by expressly consenting to a continuation of the trial in his absence. 223 U.S. at 453-459. The Court began its analysis with the observation that the Sixth Amendment right of confrontation (like the Philippine statutory equivalent at issue in that case) "is in the nature of a privilege extended to the accused, rather than a restriction upon him * * * and that he is free to assert it or to waive it, as to him may seem advantageous." *Id.* at 450. In *Taylor* v. *United States*, 414 U.S. 17, 19-20 (1973) (per curiam), the Court held that, even if the defendant has not given express consent to conducting the trial in his absence, "mere voluntary absence from * * * trial" may constitute an "effective[] waive[r]" of the right to be present. And in *Illinois* v. *Allen*, 397 U.S. 337, 343 (1970), the Court made clear that, even when a defendant insists on being present, he may be excluded from the courtroom if he behaves so disruptively as to prevent the trial from proceeding. Although this Court's decisions in *Diaz*, *Taylor*, and

---

accused who voluntarily absented himself before trial was declared an "outlaw." 2 W. Holdsworth, *A History of the English Law* 604-605 (5th ed. 1942). In most felony cases, a declaration of outlawry "amount[ed] to a conviction of the crime of which the defendant [was] indicted, as much as if he had been actually found guilty by the verdict of a jury." 1 J. Chitty, *Practical Treatise on the Criminal Law* 365 (1847); T. Plucknett, *A Concise History of the Common Law* 431 (5th ed. 1956). An outlaw, once apprehended, was jailed, he was subject to execution, and he forfeited all of his property. 1 J. Chitty, *supra*, at 365; Moreover, until at least the mid-14th century, an outlaw could "lawfully be killed by anyone who happened to meet him." *Id.* at 366; see W. Holdsworth, *supra*, at 605.

Allen did not involve a defendant who deliberately failed to appear even for the beginning of his trial, the reasoning of those decisions leads to the conclusion that a waiver of the right to be present may occur in that context.

The decisions in *Diaz*, *Taylor*, and *Allen* were based upon the principle that a criminal defendant should not be permitted to defeat a trial by his own misconduct. Thus, the *Diaz* Court, quoting from an earlier court of appeals decision, stated:

> The question is one of broad public policy, whether an accused person, placed upon trial for crime and protected by all the safeguards with which the humanity of our present criminal law sedulously surrounds him, can with impunity defy the processes of that law, paralyze the proceedings of [the] courts and juries and turn them into a solemn farce * * *. Neither in criminal nor in civil cases will the law allow a person to take advantage of his own wrong. And yet this would be precisely what it would do if it permitted * * * an absconding from the jurisdiction while at large on bail, during the pendency of a trial before a jury, to operate as a shield.

223 U.S. at 458 (quoting *Falk* v. *United States*, 15 App. D.C. 446, 460-461 (1899), cert. denied, 181 U.S. 618 (1901)). In *Taylor*, the Court similarly reasoned that "the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward." 414 U.S. at 20 (quoting *Illinois* v. *Allen*, 397 U.S. at 349 (Brennan, J., concurring)). In *Allen*, the Court rejected the notion that a criminal defendant's right to be present extended so far as to "permit[] [the defendant] by his disruptive conduct indefinitely to

avoid being tried on the charges brought against him." 397 U.S. at 346; see also *id.* at 345 (a court may imprison a disruptive defendant for contempt and discontinue the trial, but the court should "guard against allowing a defendant to profit from his own wrong" by "elect[ing] to spend a prolonged period in confinement for contempt in the hope that adverse witnesses might be unavailable after a lapse of time").

The principle that an accused should not, by his misconduct, be permitted to prevent a trial on the charges against him is directly applicable in the present context. A defendant has the duty both to appear for and remain present throughout trial. See 18 U.S.C. 3146; *Taylor*, 414 U.S. at 20 (citing *Stack* v. *Boyle*, 342 U.S. 1, 4-5 (1951)); see also Cohen, *Trial in Absentia Re-examined*, 40 Tenn. L. Rev. 155, 156 (1973) (distinguishing criminal defendant's "right of presence," which is "well-accepted," from a "right of absence," which is "generally unaccepted"). Requiring the court to order an open-ended postponement of trial would reward the defendant's misconduct by preventing a trial "until the accused person himself should be pleased to permit it." *Diaz*, 223 U.S. at 457 (quoting *Falk*, 15 App. D.C. at 454). This Court's decisions in *Diaz*, *Taylor*, and *Allen* make clear that the Constitution does not require such a result.

In short, both the Sixth Amendement right to confrontation and the due process right to be present at trial are subject to waiver. The Confrontation Clause merely ensures that the defendant has the right to confront witnesses if he chooses; it does not require that he exercise that right. And the Due Process Clause protects the defendant's right to be present only to the extent of ensuring him a "ful[l] * * * opportunity to defend against the charge[s]." *Gagnon*, 470 U.S. at 526 (quoting *Snyder* v. *Massachusetts*, 291 U.S. at 105-106). Due process is not offended when the defendant deliberately forgoes that opportunity.

B. Rule 43 Of The Federal Rules Of Criminal Procedure Does Not Prohibit A Court From Trying A Defendant Who Knowingly And Voluntarily Fails To Appear For Trial

Petitioner's principal argument is that, under Rule 43 of the Federal Rules of Criminal Procedure, a court may not try a defendant *in absentia* unless the defendant was present for the beginning of the trial. We recognize, of course, that the Rule does not authorize such a trial *in absentia*, but neither does the Rule prohibit it. The Rule is simply silent with respect to a court's options when a defendant voluntarily and knowingly fails to appear for trial at all.

Rule 43 provides that a defendant is "required" to be present "at the arraignment, at the time of the plea, [and] at every stage of the trial" Fed. R. Crim. P. 43(a); it also sets forth certain circumstances in which the defendant's presence is "not required," Fed. R. Crim. P. 43(c). Those provisions make clear, for example, that the defendant has an obligation to be present at trial; he may not "exercise" his right to be present by refusing to attend. See, *e.g.*, *United States* v. *Durham*, 587 F.2d 799 (5th Cir. 1979); *United States* v. *Moore*, 466 F.2d 547, 548 (3d Cir. 1972), cert. denied, 409 U.S. 1111 (1973); *United States* v. *Fitzpatrick*, 437 F.2d 19, 27 (2d Cir. 1970).[5]

---

[5] It appears that the drafters of Rule 43 were concerned that the Rule not be read to give a criminal defendant the freedom to choose whether to appear at his trial or not. Early drafts of the Rule referred to the defendant's "right to be

Although Rule 43 clearly acknowledges the defendant's right to be present at trial, it makes only one express reference to that right. That reference is found in part (b) of the Rule, which provides that the right may be deemed waived "whenever a defendant, initially present, * * * is voluntarily absent after the trial has commenced," and whenever the defendant, after being warned, engages in conduct that disrupts the trial. The Rule does not expressly address whether a defendant may also be deemed to have waived the right to be present by knowingly and voluntarily failing to appear even for the commencement of his trial.

Petitioner ultimately acknowledges that his position is based not on the express provisions of Rule 43, but on the maxim *expressio unius est exclusio alterius*. Pet. Br. 25. Petitioner argues that since Rule 43 expressly provides for a waiver when the defendant absconds once trial has started, it implicitly precludes a finding of waiver when the defendant absconds before trial has begun. Pet. Br. 26. The problem with that argument is that Rule 43 does not purport to contain a comprehensive listing of the circumstances under which the right to be present may be waived. It is therefore neither surprising nor significant that

---

present" at trial. See 1 M. Wilken & N. Triffin, *Drafting History of the Federal Rules of Criminal Procedure* 57 (1991) [hereinafter *Drafting History*]. In the final report of the Advisory Committee, however, the language stating that "[t]he defendant has the right to be present" was replaced by language stating that "[t]he defendant shall be present." 7 *Drafting History* 69. That revision may have been prompted by comments voicing concern that the earlier formulation could be read to allow defendants to exercise their "right" in a manner that would defeat orderly trial procedures. See 2 *Drafting History* 235; 3 *Drafting History* 511.

the Rules does not address the question whether a defendant may be tried *in absentia* if he fails to appear for trial at all. Cf. *Connecticut Nat'l Bank* v. *Germain*, 112 S. Ct. 1146, 1148-1150 (1992) (rejecting statutory interpretation based on negative implication).

From the outset, the principal provisions of Rule 43 have consisted of a codification of this Court's decisions on the obligation and right of the defendant to be present at trial. The Advisory Committee Notes to the original version of Rule 43 make clear that both the provision requiring the defendant to be present and the provision authorizing a finding of a waiver after the commencement of the trial are "restatement[s] of existing law." Notes of Advisory Committee on Rules, 18 U.S.C. at 1982 (1946). It is therefore appropriate in construing the Rule to look to the "existing law," as this Court had defined it.

When Rule 43 was adopted in 1945, it was well established that a defendant's right to be present at trial could "be lost by consent or at times even by misconduct." *Snyder* v. *Massachusetts*, 291 U.S. at 106. The Court had "expressly rejected" the "broad dicta" in early decisions suggesting that the right could never be waived. *Illinois* v. *Allen*, 397 U.S. at 342 (citing *Diaz* v. *United States*, 223 U.S. 442, 453 (1912)); see also *Frank* v. *Mangum*, 237 U.S. 309, 338-343 (1915) (defendant in capital case waived right to be present when verdict was returned).

In *Diaz*, the Court applied that principle of waiver by holding that, although the defendant had a right under applicable Philippine laws to be present at all stages of his trial, he validly waived that right by voluntarily absenting himself after trial began. *Id.* at 455. The holding in *Diaz* was later codified in the

provision of Rule 43 that "[i]n prosecutions for offenses not punishable by death, the defendant's voluntary absence after the trial has been commenced in his presence shall not prevent continuing the trial to and including the return of the verdict." 18 U.S.C. at 1982 (1946).

Petitioner acknowledges (Pet. Br. 14-16) that Rule 43 was meant to codify the Court's decision in *Diaz*, and that the Rule should be read in light of that decision. He argues, however, that *Diaz* stands for the proposition that a waiver of the right to be present can never be found when a defendant absconds before his trial begins. See Pet. Br. 15-16 (*Diaz* applied "a clear-cut rule * * * that a trial actually pending before a jury may proceed as to an absent defendant only if he was initially present"). Yet, nothing in *Diaz* suggests that a defendant may be tried *in absentia* only if he absconds after a trial begins, and not if he absconds prior to trial. Nor is any such suggestion made in the decisions cited in *Diaz*. Those decisions, like *Diaz* itself, simply upheld the convictions of defendants who were absent during part of their trials and did not address the question of the validity of trying an absent defendant who had absconded prior to trial. See *Diaz*, 223 U.S. at 455-456.

Indeed, aside from language in several 19th-century decisions suggesting that a defendant's right to be present at trial can *never* be waived, see, *e.g.*, *Lewis* v. *United States*, 146 U.S. 370, 372 (1892); *Hopt* v. Utah, 110 U.S. 574, 579 (1884), we are unaware of any federal case decided prior to the adoption of Rule 43 holding that a defendant who absconds prior to trial cannot be tried *in absentia*. Nor has our research revealed any federal decisions expressly approving trial *in absentia* in that situation. In short, the question presented in this case had seldom, if ever, arisen.

The important point is that there was no common law rule prohibiting trial *in absentia* of a defendant who absconded prior to trial. Since Rule 43 was intended to restate existing law, it should not be construed as adopting such a prohibition.[6]

C. This Court Should Not Adopt A Rule Barring The Trial Of A Defendant *In Absentia*, Even When The Defendant Knowingly And Voluntarily Fails To Appear For Trial

Apart from the provisions of Rule 43, petitioner urges this Court to adopt a rule prohibiting the trial

---

[6] In 1974, Rule 43 was amended, again for the purpose of codifying the result of one of this Court's decisions, *i.e.*, "to reflect *Illinois* v. *Allen*." Advisory Committee Note on 1974 Amendment, 18 U.S.C. App. at 821 (1988). As amended, Rule 43 expressly authorizes the court to exclude a disruptive defendant from the courtroom. The 1974 amendment did not address the question presented here, but an earlier amendment proposed by the Advisory Committee in January 1973 would have done so. The 1973 Advisory Committee proposal stated that a defendant "shall be considered to have waived his right to be present whenever * * * a defendant, who has personally entered a plea to the charge and has been personally advised when the trial is to commence, voluntarily, knowingly, and without justification, fails to be present at the designated time and place for trial." Committee on Rules of Practice and Procedure, Judicial Conference of the U.S., *Preliminary Draft of Proposed Amendments to the Federal Rules of Criminal Procedure, etc.* 32 (Jan. 1973), *microformed on* CIS No. CM-4213 (Congressional Info. Serv.). It is not clear why the 1973 proposal was rejected, although the Committee may have chosen simply to leave the issue for further development in the courts. That seems particularly likely in light of this Courts' disposition of *Tacon* v. *Arizona*, 410 U.S. 351 (1973) (per curiam). That case was expected to decide the question whether the Constitution permits a trial *in absentia*, but the Court left that question open when it dismissed the writ as improvidently granted because the issue had not been preserved below.

in absentia of a defendant who deliberately fails to appear for trial. Pet. Br. 11, 29-30. Petitioner contends that, even if that rule is not required by the Constitution, it is compelled by "the high value which the American justice system places on having a defendant present at his trial," *id.* at 24. The rule petitioner proposes, however, would unjustifiably treat defendants who abscond prior to trial differently from defendants who abscond after the trial has begun. The lower courts have correctly applied the same approach in both situations, and that approach fully protects the defendant's right to be present at trial.

We recognize the importance of the defendant's presence at his trial. The presence of the defendant, and his concomitant ability to confront the witnesses against him and assist in his defense, help preserve the integrity of the factfinding process. See *Illinois* v. *Allen*, 397 U.S. at 347 ("Constitutional power to bring an accused to trial is fundamental to a scheme of 'ordered liberty' and prerequisite to social justice and peace.") (Brennan, J., concurring); see also *White* v. *Illinois*, 112 S. Ct. 736, 743 (1992); *Kentucky* v. *Stincer*, 482 U.S. 730, 736, 745 (1987). Those considerations, however, apply with the same force whether the defendant absconds prior to trial or after the trial begins. To hold that a waiver may occur only in the latter situation would create a perverse incentive for defendants contemplating flight to do so at the earliest opportunity.

As petitioner acknowledges, Pet. Br. 18 n.6, no court has construed either Rule 43 or the Constitution to require reversal of the conviction of a defendant who deliberately failed to appear for trial and was tried *in absentia*.[7] On the contrary, every court of

[7] Petitioner cites (Pet. Br. 18 n.6) *United States* v. *Hudson*, 313 F. Supp. 422 (D. Del. 1970), as suggesting that a defendant who absconds prior to trial may not be tried *in absentia*. *Hudson*, however, did not involve a trial *in absentia*, but was a petition by sureties on a bail bond to vacate an order forfeiting the bond. In response to the sureties' argument that they should not be penalized for the defendant's failure to appear for trial because the trial could have been held in the defendant's absence, the district court suggested that the defendant could not have been tried in his absence under Rule 43 because he was not present at the commencement of the trial. *Id.* at 426. That suggestion was dictum, however, because the court went on to reject the sureties' argument as "completely irrelevant" to the validity of the forfeiture order. *Id.* at 427.

Petitioner seeks to explain the absence of case law supporting his position by asserting that no appealable order results from a trial court's decision not to hold a trial in the defendant's absence. As we note below, however, there have been many occasions when district courts have tried defendants who absconded before trial, and every court of appeals that has considered the issue has upheld the practice.

appeals to consider the issue has held that a defendant who knowingly and voluntarily absconds prior to trial may be tried in his absence.[8] So, too, a majority

[8] *United States* v. *Lochan*, 674 F.2d 960, 963, 967-968 (1st Cir. 1982); *United States* v. *Mera*, 921 F.2d 18, 20-21 (2d Cir. 1990); *United States* v. *Sanchez*, 790 F.2d 245, 249 (2d Cir.), cert. denied, 479 U.S. 989 (1986); *United States* v. *Barton*, 647 F.2d 224, 238-239 (2d Cir.), cert. denied, 454 U.S. 857 (1981); *United States* v. *Pastor*, 557 F.2d 930, 933-939 (2d Cir. 1977); *United States* v. *Tortora*, 464 F.2d 1202, 1209-1210 (2d Cir.), cert. denied, 409 U.S. 1063 (1972); *Government of the Virgin Islands* v. *Brown*, 507 F.2d 186, 189 (3d Cir. 1975); *United States* v. *Schocket*, 753 F.2d 336, 340 (4th Cir. 1985); *United States* v. *Muzevsky*, 760 F.2d 83, 84 (4th Cir. 1985); *United States* v. *Powell*, 611 F.2d 41, 42 (4th Cir. 1979); *United States* v. *Peterson*, 524 F.2d 167, 184 (4th Cir. 1975), certs. denied, 423 U.S. 1088 and 424 U.S. 925 (1976); *Arizona* v. *Hunt*, 408 F.2d 1086, 1095-1096 (6th Cir. 1969); *United States* v. *Houtchens*, 926 F.2d 824, 826-827 (9th Cir. 1991); *Brewer* v. *Raines*, 670 F.2d 117, 119 (9th Cir. 1982); *United States* v. *Edmonson*, No. 90-3189 (10th Cir. May 6,

of the state courts to address the question have held that a defendant who absents himself before trial waives his right to be present.[9]

Those decisions recognize that there are no "talismanic properties" that distinguish the commencement of a trial from later stages so as to justify one rule for defendants who abscond prior to trial and a different, more flexible, rule for those who abscond after trial begins. *Government of the Virgin Islands* v. *Brown*, 507 F.2d 186, 189 (3d Cir. 1975); accord *United States* v. *Peterson*, 524 F.2d 167 (4th Cir. 1975), cert. denied, 423 U.S. 1088 (1976). As the court of appeals in this case observed, "the voir dire examination [of the prospective jurors] is probably not as critical as cross-examination of the key witnesses, which occurs in the later phases of a trial. It would be anomalous to attach more significance to a defendant's absence at commencement than to absence during more important substantive portions of the trial." J.A. 58; accord *Brown*, 507 F.2d at 189. The courts have properly concluded that the principle

1992), slip op. 14-19; *United States* v. *Wright*, 932 F.2d 868, 879 (10th Cir.), certs. denied, 112 S. Ct. 428 and 450 (1991); see also *United States* v. *Crews*, 695 F.2d 519, 520-521 (11th Cir. 1983) (upholding conviction of defendant who signed written waivers of right to be present at commencement of trial).

[9] See, *e.g.*, *McCaffrey* v. *State*, 577 N.E.2d 617 (Ind. Ct. App. 1991); *State* v. *Galloway*, 817 P.2d 1124 (Kan. Ct. App. 1991); *Thomas* v. *State*, 586 So. 2d 282 (Ala. Crim. App. 1991); *State* v. *DeWeese*, 816 P.2d 1 (Wash. 1991); *Murphy* v. *State*, 555 N.E.2d 127 (Ind. 1990); *Barnett* v. *State*, 512 A.2d 1071 (Md. 1986); *State* v. *Jackson*, 351 S.E.2d 167 (S.C. 1986); *State* v. *Kirk*, 699 S.W.2d 814 (Tenn. Crim. App. 1985), cert. denied, 475 U.S. 1023 (1986); *State* v. *Zavala*, 666 P.2d 456 (Ariz. 1983). Others, however, have taken a different view, see *Hunter* v. *Commonwealth*, 409 S.E.2d 483 (Va. Ct. App. 1991); *Commonwealth* v. *Felton*, 307 A.2d 51 (Pa. 1973), cert. denied, 415 U.S. 984 (1974).

underlying this Court's decisions in *Diaz*, *Taylor*, and *Illinois* v. *Allen*—that "the governmental prerogative to proceed with a trial may not be defeated by conduct of the accused that prevents the trial from going forward," *Taylor*, 414 U.S. at 20 (quoting *Illinois* v. *Allen*, 397 U.S. at 349 (Brennan, J., concurring))—applies equally to commencing and continuing a trial when a defendant deliberately chooses not to attend.

Contrary to petitioner's contention (Pet. Br. 10-11, 26-28), the courts have not resorted to "ad hoc" procedures to determine under what circumstances a defendant who fails to appear for trial may be tried in his absence. The courts have followed the same approach that they apply under Rule 43(b)(1) when a defendant initially appears for trial but later absconds. See, *e.g.*, *United States* v. *Lochan*, 674 F.2d 960, 967-968 (1st Cir. 1982). That approach is the one first adopted by the Second Circuit in *United States* v. *Tortora*, 464 F.2d 1202, cert. denied, 409 U.S. 1063 (1972). See J.A. 59-61.[10]

The *Tortora* analysis entails a two-part inquiry. The first part is directed to the question whether the defendant has knowingly and voluntarily absented himself from trial, *i.e.*, whether his conduct can properly be held to be a waiver of his right to be present. The *Tortora* court held that "[i]t must clearly appear in the record * * * that the defendant was advised when proceedings were to commence and that

[10] *Tortora* was apparently the first decision expressly addressing whether a defendant who fails to appear for trial may, consistently with Rule 43 and the Constitution, be tried in his absence. See Starkey, *Trial in Absentia*, 53 St. John's L. Rev. 721, 727-728 (1979). *Tortora* has been widely cited in other circuits. See, *e.g.*, *Wright*, 932 F.2d at 879; *Houtchens*, 926 F.2d at 826-827; *Lochan*, 674 F.2d at 968; *Peterson*, 524 F.2d at 185-186; *Brown*, 507 F.2d at 189.

he voluntarily, knowingly, and without justification failed to be present at the designated time and place before the trial may proceed in his absence." *Tortora*, 464 F.2d at 1209. The courts of appeals have made clear that convictions are subject to reversal if the evidence is inadequate to support such a finding.[11]

The second part of the *Tortora* inquiry is directed to the question whether, having found a waiver, the court should proceed with trial, or whether it would be an abuse of the court's discretion to do so. Because it is "obviously desirable" that a defendant be present at his own trial, the court held that a district court should proceed with trial in the defendant's absence only after determining that the public interest in proceeding with trial "clearly outweighs that of the voluntarily absent defendant." *Tortora*, 464 F.2d at 1210. In making that determination, the court noted that the district court should consider factors such as the likelihood that the defendant will reappear in the near future; the difficulty of rescheduling the trial; whether the trial involves multiple defendants, and if so, whether the government would be unduly burdened by having to conduct multiple trials involving overlapping evidence; and whether rescheduling the trial would impose an undue burden on the government's witnesses. *Ibid.*; see also *United States* v. *Sanchez*, 790 F.2d 245, 251 (2d Cir.), cert. denied, 479 U.S. 989 (1986).

Under that standard, trial *in absentia* remains very much the exception rather than the rule. Nonetheless, providing district courts with the authority to

[11] See, *e.g.*, *United States* v. *Camacho*, 955 F.2d 950, 954 (4th Cir. 1992); *United States* v. *Alikpo*, 944 F.2d 206, 208-209 (5th Cir. 1991); *United States* v. *Hernandez*, 873 F.2d 516, 519 (2d Cir. 1989); cf. *Cureton* v. *United States*, 396 F.2d 671, 676 (D.C. Cir. 1968).

conduct trials *in absentia* in appropriate cases has given those courts an important source of authority to ensure that defendants do not by their misconduct thwart "the proper administration of criminal justice," *Illinois* v. *Allen*, 397 U.S. at 343.[12] There is therefore no reason for this Court to reject the uniform line of lower court authority and hold that a court may not find that an absconding defendant has waived his right to be present at trial.

D. The District Court Properly Found That Petitioner Knowingly And Voluntarily Absented Himself From Trial

Petitioner contends (Pet. Br. 28) that in "certain cases" defendants who fail to appear for trial and are tried *in absentia* will be deprived of procedural due process. He suggests, as an example, that a defendant's due process rights would be violated if the court failed to find that the absent defendant had knowledge of the trial date. *Ibid.*[13] In a similar vein, peti-

[12] It is particularly important in cases involving serious crimes that courts have the capacity to hold trials *in absentia*, because in those cases the other available remedies may be inadequate to discourage defendants from absconding. When a defendant faces likely conviction and a substantial sentence, the threat of contempt sanctions or a prosecution for bail jumping (18 U.S.C. 3146) in the event of his ultimate arrest may not be enough to counter the incentive to flee. *Tortora*, 464 F.2d at 1209; see also *Illinois* v. *Allen*, 397 U.S. at 344-345.

[13] In connection with that example, petitioner refers (Pet. Br. 27, 28) to *United States* v. *Mera*, 921 F.2d 18 (2d Cir. 1990). That reference is misleading, however. In *Mera*, the trial court specifically found, following an evidentiary hearing, that the absconding defendant had actual knowledge of the date on which his trial was scheduled to commence. *Id.* at 19. The court of appeals sustained that finding, holding

tioner's amicus suggests that it would be unconstitutional to try a defendant in his absence if the defendant failed to appear for trial because of illness. ACLU Amicus Br. 11.[14] Those hypothetical cases, however, present issues quite different from the one presented in this case, *i.e.*, whether a court may try a defendant *in absentia* after finding that the defendant has knowingly and voluntarily absented himself from the trial.

While some cases may present a serious question whether a defendant has knowingly and voluntarily waived his right to be present, this case is not one of them. Petitioner does not, and cannot, dispute that he knew when his trial was to begin. He personally appeared in court on three occasions when the trial date of October 12, 1988, was discussed. See J.A. 48-49. That date was also set forth in a written notice to counsel. J.A. 48. In addition, petitioner's attorney told the court that there was no objection to the trial date. J.A. 49.

Petitioner does not point to anything, other than his desire not to attend, that might have kept him away from his trial. In fact, there was ample evidence that

---

that it was not clearly erroneous. *Id.* at 20. The court of appeals held, in the alternative, that it was not necessary for the defendant to know the precise date because, by appearing at arraignment and pleading to the charges, he had notice of the proceedings against him. *Id.* at 20-21.

[14] Amicus does not cite (and we are not aware of) any case involving that situation. Of course, the circumstances would be very different if, for example, a hospitalized defendant expressly waived his presence at a portion of the trial, see *United States* v. *Crews*, 695 F.2d at 520, or if a defendant feigned illness or decided to schedule elective surgery at a time that would interfere with the trial, see *United States* v. *Barton*, 647 F.2d at 238.

petitioner abandoned his residence precisely in order to avoid standing trial. See J.A. 19, 25. Nor does petitioner complain about the adequacy of the procedures that the trial court employed in deciding whether to hold the trial. The court made extensive inquiries in an effort to locate petitioner, which involved the Marshals Service and petitioner's family and bondsman. J.A. 43-44, 49-50. In short, the district court's finding of waiver in this case is unassailable.

It is equally clear that the district court, having found a waiver, did not abuse its discretion in proceeding to trial in petitioner's absence. The district court correctly concluded that granting a severance to petitioner and indefinitely postponing his trial would impose an unusually heavy burden on the government, the witnesses, and the court. The four-defendant trial in this case was scheduled to run a number of weeks, and the government had assembled a total of 83 witnesses to testify in its case-in-chief. Many of those witnesses were elderly and infirm, and many of them had to travel to Minnesota from across the country and from Canada. J.A. 44, 51, 61 n.3. The case for holding a single trial on or shortly after the scheduled trial date was therefore compelling.

In sum, this case presents a clear example of a defendant's purposeful effort to defeat justice by absconding from trial, where the options of postponing the entire trial or granting a severance to the co-defendants and contemplating a later, separate trial for the absconding defendant would have been very burdensome. It was therefore proper for the district court to conclude that petitioner had waived his right to be present and that the trial should be conducted in his absence.

CONCLUSION

The judgment of the court of appeals should be affirmed.

Respectfully submitted.

KENNETH W. STARR
Solicitor General

ROBERT S. MUELLER, III
Assistant Attorney General

WILLIAM C. BRYSON
Deputy Solicitor General

RICHARD H. SEAMON
Assistant to the Solicitor General

MICHAEL E. O'NEILL
Attorney

MAY 1992

☆ U. S. GOVERNMENT PRINTING OFFICE, 1992 312324 45433

Supreme Court, U.S.
FILED
APR 15 1992
OFFICE OF THE CLERK

No. 91-6194

IN THE

Supreme Court of the United States

OCTOBER TERM, 1991

MICHAEL J. CROSBY,

Petitioner,

—v.—

UNITED STATES OF AMERICA,

Respondent.

ON WRIT OF *CERTIORARI* TO THE
UNITED STATES COURT OF APPEALS FOR THE EIGHTH CIRCUIT

BRIEF *AMICUS CURIAE* OF THE AMERICAN CIVIL LIBERTIES UNION IN SUPPORT OF PETITIONER

Steven R. Shapiro
(*Counsel of Record*)
Maya Wiley
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES ii

INTEREST OF *AMICUS* 1

STATEMENT OF THE CASE 1

SUMMARY OF ARGUMENT 3

ARGUMENT 5

I. THE COURT SHOULD GIVE EFFECT TO THE PLAIN MEANING OF RULE 43 5

A. The Plain Meaning Of Rule 43, Like The Plain Meaning Of Any Statute, Is Controlling And Should Have Been Followed By The Courts Below 5

B. The Plain Meaning Of Rule 43 Is Consistent With The Prevailing Case Law At The Time The Rule Was Enacted 11

C. The Decision To Conduct An Entire Trial Without The Presence Of The Criminal Defendant Raises Significant Constitutional Issues That This Court Should Not Address Until They Are First Considered By The Drafters Of Rule 43 14

CONCLUSION 17

TABLE OF AUTHORITIES

Cases

	Page
American Tobacco Co. v. Patterson, 456 U.S. 63 (1982)	8
Andrus v. Glover Construction Co., 446 U.S. 608 (1980)	7
Atchison, T. & S.F. Ry. v. Scarlett, 300 U.S. 471 (1937)	6
Bartōn v. State, 67 Ga. 653 (1881)	12
Blue Chip Stamps v. Manor Drug Stores, 421 U.S. 723 (1975)	6
Blum v. Stenson, 465 U.S. 886 (1984)	6
Chambers v. Mississippi, 410 U.S. 284 (1973)	14, 15
Commissioner v. Brown, 380 U.S. 563 (1965)	8
Consumer Product Safety Comm'n v. GTE Sylvania, Inc., 447 U.S. 102 (1980)	6, 8
Continental Casualty Co. v. U.S., 314 U.S. 527 (1942)	7
Coy v. Iowa, 487 U.S. 1012 (1988)	15
Crane v. U.S., 162 U.S. 625 (1896)	9

	Page
DeBartolo v. Florida Gulf Coast and Const. Trades Council, 485 U.S. 568 (1988)	14
Diaz v. U.S., 223 U.S. 442 (1913)	4, 11, 12, 13
Dowell v. United States, 221 U.S. 325 (1911)	16
Falk v. U.S., 15 App.D.C. 446 (1899), *rev'd on other grounds*, 180 U.S. 636 (1901)(mem.)	12
Ford Motor Credit Co. v. Cenance, 452 U.S. 155 (1981)	6
Garland v. Washington, 232 U.S. 642 (1914)	9
Griffin v. Oceanic Contractors, Inc., 458 U.S. 564 (1982)	7, 8
Hamilton v. Alabama, 368 U.S. 52 (1961)	9
Hamling v. U.S., 418 U.S. 87 (1974)	5
Hoffman v. Connecticut Income Dep't, 492 U.S. 96 (1989)	7
Hopt v. Utah, 110 U.S. 574 (1884)	13
Howe v. Smith, 452 U.S. 473 (1981)	8
Illinois v. Allen, 397 U.S. 337 (1970)	4, 12, 13

Page

In Re U.S.,
784 F.2d. 1062 (11th Cir. 1986) 9

Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories,
460 U.S. 150 (1983) 8

Kentucky v. Stincer,
482 U.S. 730 (1987) 15

Lewis v. U.S.,
146 U.S. 370 (1892) 4, 11, 12, 13

Mallard v. U.S. District Court for Southern District of Iowa,
490 U.S. 296 (1989) 6

Martin v. Hunter,
4 U.S. (1 Wheat) 304 (1816) 9

Mattox v. United States,
156 U.S. 237 (1895) 15

McCarthy v. U.S.,
394 U.S. 459 (1969) 5

NLRB v. Catholic Bishop of Chicago,
440 U.S. 490 (1979) 14

Norfolk & Western Railway Co. v. American Train Dispatchers Ass'n,
499 U.S. ___, 111 S.Ct. 1156 (1991) 5, 7

Ohio v. Roberts,
448 U.S. 56 (1980) 6, 14

Old Colony R. Co. v. Commissioner of Internal Revenue,
284 U.S. 552 (1931) 9

Page

Pennsylvania Dep't of Public Welfare v. Davenport,
495 U.S. ___, 110 S.Ct. 2126 (1990) 6

Pennsylvania v. Ritchie,
480 U.S. 39 (1987) 14

Powell v. Alabama,
287 U.S. 45 (1932) 16

Prussian v. U.S.,
282 U.S. 675 (1931) 6

Rubin v. U.S.,
449 U.S. 424 (1981) 7

Snyder v. Massachusetts,
291 U.S. 97 (1934) 15, 16

Tennessee Valley Authority v. Hill,
437 U.S. 153 (1978) 7

U.S. v. American Trucking Ass'ns, Inc.,
310 U.S. 534 (1940) 8

U.S. v. Locke,
471 U.S. 84 (1985) 7

U.S. v. Robinson,
361 U.S. 220 (1960) 6

U.S. v. Ron Pair Enterprises, Inc.,
489 U.S. 235 (1989) 7

U.S. v. Turkette,
452 U.S. 576 (1981) 8

Statutes and Rules

18 U.S.C. §3150 11

28 U.S.C. §2071 ..... 5, 6

Page

Federal Rules of Criminal Procedure
Rule 43 ..... *passim*
Rule 10 9
Rule 11 10

Other Authorities

Federal Rules of Criminal Procedure,
Notes of Committee on the Judiciary,
House Report No. 94-247 13

Federal Rules of Criminal Procedure,
Notes of Advisory Committee on Rules 4, 11

Webster's College Dictionary (1991) 9

INTEREST OF *AMICUS*[1]

The American Civil Liberties Union (ACLU) is a nationwide, nonpartisan organization of nearly 300,000 persons dedicated to preserving and protecting the civil rights and civil liberties guaranteed by law.

This case raises fundamental issues about the operation of our criminal justice system. In particular, the government's asserted right to try a defendant *in absentia* has potentially far-reaching consequences for the criminal justice system and the adversarial process on which it rests.

The ACLU has long believed that the adversarial process is critical to the fairness of the criminal justice system and has filed numerous briefs in support of that position, both as direct counsel and as *amicus curiae*. This case brings those issues once again before this Court.

STATEMENT OF THE CASE

In 1988, Michael J. Crosby and three codefendants were arrested and charged with crimes arising out of a fraudulent scheme in which customers paid for, but never received, silver commemorative medallions.[2] Following his arrest, Crosby attended several pretrial conferences at which the court advised all parties that a trial date had been set for October 12, 1988. Additionally, the clerk of the court mailed a notice to Crosby's counsel confirming the trial date.

---

[1] Letters of consent to the filing of this brief have been lodged with the Clerk of the Court pursuant to Rule 37.3.

[2] These facts are derived from the opinion below. *See generally United States v. Crosby*, 917 F.2d 362 (8th Cir. 1990).

Despite this notice, Crosby failed to appear for trial on October 12 or to send any explanation for his absence. In response, the court issued a bench warrant for his arrest. When federal marshals were unable to locate Crosby by October 17, the district judge held the trial without him. In his absence, Crosby was convicted of twenty-five counts of mail fraud. Seven months later, Crosby was apprehended again and sentenced to four consecutive five-year terms on twenty-two of the counts.[3] He also received five years probation to commence upon completion of his prison term, during which he is required to pay $550,000 restitution to his victims.

In explaining his decision to try Crosby *in absentia*, the district judge noted that Crosby had "deliberately, voluntarily, knowingly, and without justification failed to be present at the designated time and place for the trial of the action." 917 F.2d at 363. The district judge also stressed that the 3 codefendants, all counsel, 54 jurors and over 80 witnesses had already gathered for the proceedings. These factors persuaded the district judge that it was impractical to reschedule the trial or to sever Crosby's case.

On appeal, Crosby argued that the decision to try him *in absentia* violated the plain meaning of Rule 43(a) of the Federal Rules of Criminal Procedure, which provides that "[t]he defendant shall be present . . . at every stage of the trial including the impaneling of the jury and the return of the verdict . . . ."[4] Apparently relying

[3] He received a suspended sentence on the three remaining counts.

[4] Rule 43 provides, in pertinent part (emphasis added):

> (a) **Presence Required.** The defendant *shall be present* at the arraignment, at the time of the plea, at every stage of the trial including the impaneling of the jury and the return of the verdict, and at the imposition of sentence, *except as* (continued...)

on Rule 43(b), the Eighth Circuit held that Crosby had waived his right to be present at trial, even though the discussion of waiver in Rule 43(b) specifically refers to a defendant who is "initially present" when trial commences. Here, the Eighth Circuit acknowledged that Crosby was not "initially present" at trial within the meaning of Rule 43(b). Nevertheless, it declined to follow the literal wording of Rule 43 because it believed that a literal application of the Rule would produce an irrational result in this case.

SUMMARY OF ARGUMENT

This case raises a narrow question of statutory construction: What is meant by Rule 43 of the Federal Rules of Criminal Procedure? In our view, the answer to that question is simple and straightforward. Accordingly, there is no need for this Court to decide whether the Constitution would ever permit a criminal defendant

[4] (...continued)

> *otherwise provided by this rule.*
>
> (b) **Continued Presence Not Required.** *The further progress of the trial* to and including the return of the verdict shall not be prevented and the defendant shall be considered to have waived the right to be present whenever a defendant, *initially present,*
>
> (1) is voluntarily absent *after the trial has commenced* (whether or not the defendant has been informed by the court of the obligation to remain during the trial), or
>
> (2) after being warned by the court that disruptive conduct will cause the removal of the defendant from the courtroom, persists in conduct which is such as to justify exclusion from the courtroom.

In addition, the Rule states that the presence of the defendant is not required in proceedings on offenses punishable by fine or imprisonment for not more than one year or both with the defendant's written consent. *See* Fed.R.Crim.P. 43(c).

to be tried *in absentia*. That hypothetical inquiry can and should be left for another day. Likewise, this case does not present any issue of inherent judicial authority. Whatever inherent authority might exist in the absence of a rule, it is the language of Rule 43 that must govern here.

Fairly read, the language of Rule 43 cannot be reconciled with the result below. In unambiguous terms, Rule 43 states that a criminal defendant "shall be present" at "every stage of the trial including the impaneling of the jury and the return of the verdict . . .", except in specific circumstances not applicable to these facts. This language is not discretionary and it does not suggest that the requirement of a defendant's presence at "every stage of the trial" is subject to further unenumerated exceptions.

The language of Rule 43 is also consistent with its legislative history. The Advisory Committee Notes on the Rules state that it codified existing precedent on the prosecution of absent defendants, *citing Lewis v. U.S.*, 146 U.S. 370 (1892), and *Diaz v. U.S.*, 223 U.S. 442 (1913). These decisions support the conclusion that a defendant may not be tried *in absentia* under the facts of this case.

Contrary to the view of the court below, Rule 43(b) neither compels nor authorizes a different conclusion. In particular, Rule 43(b)(2) was added in 1974 following the decision in *Illinois v. Allen*, 397 U.S. 337 (1970). Like *Allen* itself, Rule 43(b) permits the removal of a defendant who behaves disruptively during the course of proceedings. For present purposes, however, it is more significant that Rule 43(b) explicitly incorporates the threshold requirement that the defendant shall be "initially present" when trial begins.

Any decision to commence a trial in the defendant's absence indisputably raises substantial issues under the

Sixth and Fourteenth Amendments. The drafters of the Rule were aware of these constitutional issues and crafted a rule in light of them. If the Rule is to be redrafted, it should be done pursuant to the process that Congress created.[5] Until the Rule is redrafted, this Court should not anticipate a constitutional controversy that may never arise.

ARGUMENT

I. THE COURT SHOULD GIVE EFFECT TO THE PLAIN MEANING OF RULE 43

A. The Plain Meaning Of Rule 43, Like The Plain Meaning Of Any Statute, Is Controlling And Should Have Been Followed By The Courts Below

This case can be simply resolved by following the plain meaning of Rule 43. The question of whether the Constitution would ever permit a criminal trial to begin in the defendant's absence is an interesting one, but it is not before this Court. Likewise, the Court should not attempt to define what inherent authority a trial judge might possess to begin a trial in the defendant's absence if Rule 43 did not exist. Rule 43 exists, it is unambiguous, and its mandate must be obeyed.

This Court has repeatedly held that the meaning of a statute can best be determined by examining its language. If the statutory language is clear, no further "interpretation" is necessary or proper.[6] *See, e.g., Norfolk &*

---

[5] *See* 28 U.S.C. §2071.

[6] This Court has long employed the traditional rules of statutory construction in interpreting the Federal Rules of Criminal Procedure, including application of the plain meaning rule. *See Hamling v. U.S.*, 418 U.S. 87, 134 (1974)(district court erred by ignoring the express (continued...)

Western Railway Co. v. American Train Dispatchers Ass'n, 499 U.S. ___, ___, 111 S.Ct. 1156, 1163 (1991)(the plain language of 49 U.S.C. §11341(a) exempts a carrier from the antitrust laws if a consolidation is approved by the Interstate Trade Commission); *Pennsylvania Dep't of Public Welfare v. Davenport*, 495 U.S. ___, 110 S.Ct. 2126 (1990)(the plain language of Chapter 13 of the Bankruptcy Code required that debts include restitution obligations); *Mallard v. U.S. District Court for Southern District of Iowa*, 490 U.S. 296, 301 (1989); *Blum v. Stenson*, 465 U.S. 886, 893-94 (1984)(determining that Congress intended nonprofit organizations to be eligible for attorneys' fees under 42 U.S.C. §1988); *Ford Motor Credit Co. v. Cenance*, 452 U.S. 155, 158 n.3 (1981); *Consumer Product Safety Comm'n v. GTE Sylvania, Inc.*, 447 U.S. 102 (1980); *Blue Chip Stamps v. Manor Drug Stores*, 421 U.S. 723, 756 (1975)(Powell, J., concurring); *Prussian v. U.S.*, 282 U.S. 675, 677 (1931)(examined common use of term in an plain language of criminal statute).

By its express terms, Rule 43 does not permit a court to try a defendant *in absentia* except under clearly enumerated circumstances. Specifically, Rule 43(a) states that a defendant "*shall* be present . . . at every stage of the trial" (emphasis added). The only exceptions to this otherwise unequivocal mandate are set forth in Rule 43(b), which provides that "*further progress of the trial*" is permitted if the defendant absents himself "*after the trial has commenced*" or is "excluded from the courtroom" (emphasis added). Thus, a court does not have to halt a trial that has already begun because the defendant has stopped coming or because the defendant has been removed for disruptive behavior. Unless the language of the Rule is completely ignored, however, the trial cannot begin if the defendant is not there.

By holding that a trial may start without the defendant, the lower courts in this case have created a new exception to Rule 43(a) in the face of explicit language that the defendant's presence is required "except as otherwise provided" by the Rule.[7] If the Court allows the Eighth Circuit opinion to stand, this phrase in the Rule becomes mere surplusage, and the clear intention of the drafters would be undermined.[8] *See Hoffman v. Connecticut Income Dep't*, 492 U.S. 96, 103 (1989).

It is only under rare and exceptional circumstances that the Court will go beyond the unambiguous language of a statute. *U.S. v. Ron Pair Enterprises, Inc.*, 489 U.S. 235, 242 (1989), *citing Griffin v. Oceanic Contractors, Inc.*, 458 U.S. 564, 571 (1982); *U.S. v. Locke*, 471 U.S. 84, 93-102 (1985); *Rubin v. U.S.*, 449 U.S. 424, 430 (1981)(interpreting §17 of the Securities Act of 1933), *citing Tennes-*

---

[6] (...continued)
terms of Fed.R.Crim.P. 30); *McCarthy v. U.S.*, 394 U.S. 459, 464 (1969)(district court erred in not doing what Fed.R.Crim.P. 11 expressly directs); *U.S. v. Robinson*, 361 U.S. 220, 224-25 (1960)(in examining the plain meaning of Fed.R.Crim.P. 45(b), the Court found that the circuit court's decision was in direct conflict with the Rule). This symmetry makes sense since the Federal Rules of Criminal Procedure are promulgated by this Court pursuant to statutory authority given it by Congress, 28 U.S.C. §2071. *See Atchison, T. & S.F. Ry. v. Scarlett*, 300 U.S. 471, 474 (1937).

[7] Because the Rule contains a general prohibition against trying an absent defendant, then specifically enumerates exceptions to the prohibition, courts may not imply additional exceptions. *Andrus v. Glover Construction Co.*, 446 U.S. 608, 616-17 (1980), *citing Continental Casualty Co. v. U.S.*, 314 U.S. 527 (1942). Only when a court finds evidence of legislative intent to imply additional exceptions can a court do so. 446 U.S. 608. No such evidence of intent exists here.

Moreover, the Rule contains no catch all phrase or general statement that would allow a court discretion to read other exceptions into the Rule. *See* Norfolk & Western Railway Co., 111 S.Ct. 1156.

[8] Only subsection (c) appears to allow a court to conduct a trial with a defendant *in absentia ab initio*, but subsection (c) only applies to "prosecutions for offenses punishable by fine or by imprisonment for not more than one year, or both."

see Valley Authority v. Hill, 437 U.S. 153, 187, n.33 (1978); *Howe v. Smith*, 452 U.S. 473, 483 (1981)(interpreting whether 18 U.S.C. §5003 permits a state prison authority to house a prisoner in a federal facility).

Here, the burden is on the government to show that a literal reading would lead to an untenable result. *See Griffin v. Oceanic Contractors*, 458 U.S. 564. Moreover, the Court has found untenable results only where the purpose of Congress in enacting the legislation would be thwarted by giving effect to its plain language. *See U.S. v. American Trucking Ass'ns, Inc.*, 310 U.S. 534, 542-43 (1940); *Commissioner v. Brown*, 380 U.S. 563, 571 (1965).

Stated another way, this Court has held that the plain meaning of a statute is conclusive absent a "clearly expressed legislative intention to the contrary." *Consumer Product Safety Comm'n*, 447 U.S. at 108; *U.S. v. Turkette*, 452 U.S. 576, 580 (1981)(interpreting the word "enterprise" in RICO, 18 U.S.C. §§1961-1968); *American Tobacco Co. v. Patterson*, 456 U.S. 63, 68 (1982)(interpreting 42 U.S.C. §2000e-2(h)). *See also Jefferson County Pharmaceutical Ass'n v. Abbott Laboratories*, 460 U.S. 150, 157 (1983)(interpreting the Robinson-Patman Act's application to sales of pharmaceuticals to public hospitals for resale to the public). In this case, neither lower court pointed to any legislative history that even remotely suggests that a straightforward interpretation of Rule 43 would thwart its legislative purpose.

The plain language of Rule 43 is also inconsistent with any claim that Crosby's presence at arraignment was sufficient to satisfy the Rule's requirement that a defendant be "initially present" when trial begins. The Rule specifically and discretely refers to a defendant's presence "at the arraignment, at the time of plea, [and] at every stage of the trial . . . ." Arraignment, plea, and trial are not equivalent phases of a criminal proceeding.

The Rule itself implicitly recognizes that fact by describing them in separate clauses divided by commas.

Moreover, this grammatical formulation merely reinforces the common meaning of the words used in the Rule. *Martin v. Hunter*, 4 U.S. (1 Wheat) 304 (1816) (words in a statute should be given their common meaning absent some indication to the contrary); *see Old Colony R. Co. v. Commissioner of Internal Revenue*, 284 U.S. 552, 560 (1931). In particular, the word "trial" is commonly understood to refer to a phase of the criminal proceeding that is distinct from both the arraignment and the plea.[9]

Arraignments and pleas are pretrial activities. *See Hamilton v. Alabama*, 368 U.S. 52, 54 n.4 (1961)("[u]nder federal law an arraignment is a *sine qua non* to the trial itself -- the preliminary stage where the accused is informed of the indictment and pleads to it, thereby formulating the issue to be tried"). *See also Crane v. U.S.*, 162 U.S. 625, 644 (1896). The arraignment informs a defendant of the charges against him or her.[10] *Garland v. Washington*, 232 U.S. 642, 644 (1914). *See also* Fed.R. Crim.P. 10.[11] The plea phase allows a defendant to state

---

[9] Webster's College Dictionary (1991) at 1423:

> **Trial** n. 1a. the examination of a cause before a court of law . . .
> b. the use of due process to determine a person's guilt or innocence,
> 2. the act of trying, testing or putting to the proof.

[10] At least one court has construed Rule 43(a) in terms of its plain language, finding that defendant must be present at his arraignment. *In Re U.S.*, 784 F.2d. 1062 (11th Cir. 1986).

[11] Fed.R.Crim.P. 10 provides:

(continued...)

whether or not he or she is innocent and determines whether there will be a trial. *See* Fed.R.Crim.P. 11.[12] A trial, by contrast, involves the presentation of evidence.

Given the differences between arraignment, plea and trial, the plain language of Rule 43(a) can only be interpreted to mean that a criminal defendant must be present at each of these events. This reading of the Rule is further supported by the language of subsection (b), since it specifically requires that the trial be in progress before a court proceeds without a defendant under the enumerated exceptions.

If a literal application of the Rule causes administrative inconvenience, as both the district court and court of appeals seemed to think in this case, the appropriate procedure is to consider amending the Rule. *See* Point IC, *infra*. Unless and until the Rule is amended, however, it must be enforced as written. Furthermore, *amicus* believes that the administrative concerns voiced

---

[11] (...continued)

> Arraignment shall be conducted in open court and shall consist of reading the indictment or information to the defendant or stating to the defendant the substance of the charge and calling on the defendant to plead thereto. The defendant shall be given a copy of the indictment or information before being called upon to plead.

[12] Fed.R.Crim.P. 11 provides, in pertinent part:

> (a) **Alternatives.**
>
> (1) **In General.** A defendant may plead not guilty, guilty, or *nolo contendere*. If a defendant refuses to plead or if a defendant corporation fails to appear, the court shall enter a plea of not guilty . . . .
>
> (g) **Record of Proceedings.** A verbatim record of the proceedings at which the defendant enters a plea shall be made and, if there is a plea of guilty or *nolo contendere*, the record shall include, without limitation, the court's advice to the defendant, the inquiry into the voluntariness of the plea including any plea agreement, and the inquiry into the accuracy of a guilty plea.

by the court below, while well-meaning, are overstated. If the defendant had absconded before a trial date had been set, the district judge would presumably have faced the same choice of postponing the trial or severing Crosby's case.[13] A similar dilemma would have occurred if Crosby had gotten seriously ill on the eve of trial, after the jurors and witnesses had assembled. Such developments are unfortunate but they are hardly unprecedented and do not justify the decision in this case to ignore the plain meaning of Rule 43.

B. The Plain Meaning Of Rule 43 Is Consistent With The Prevailing Case Law At The Time The Rule Was Enacted

Rule 43(a) was adopted in 1944 as a restatement of existing law. Notes of Advisory Committee on Rules. According to the Advisory Committee, the Rule codified existing law. As examples of existing law, the Advisory Committee cited *Lewis v. U.S.*, 146 U.S. 370, and *Diaz v. U.S.*, 223 U.S. 442. Both *Lewis* and *Diaz* support Crosby's contention that the Rule required his presence at the outset of trial.

In *Lewis*, the Court determined that defendant's absence during the impaneling of the jury was reversible error. As the Court explained:

> [I]n felonies, it is not in the power of the prisoner, either by himself or his counsel, to waive the right to be personally present during trial. "It would be contrary to the dictates of humanity to let him waive the advantage which a view of his sad plight might give him by inclining the hearts of the jurors to listen to his defense with indulgence."

---

[13] In addition, it is important to note that bail jumping is a separate federal crime. *See* 18 U.S.C. §3150.

Id. at 372 (citation omitted). This statement makes clear the importance that the *Lewis* Court placed on the presence of the defendant at trial in felony cases. While it is true that the Court has stated that this right is not absolute, the Court has never ruled that the absence of the defendant from the inception of trial is a waiver of the right to be present. *See Illinois v. Allen*, 397 U.S. 337.

The *Diaz* case also supports the plain reading of the Rule. Diaz, who was charged with murder but free on bail, had been present when trial began. Subsequently, he failed to appear on two instances during the course of the trial, missing the direct testimony and cross-examination of two witnesses for the government. The Court held that his midtrial absence was a voluntary waiver of his right to be present during all phases of the trial under a Philippine statute. However, the Court made clear that this determination rested on the fact that Diaz was not in custody, that the offense was not a capital offense, and that he had been present when the trial began. Anticipating Rule 43(b)(1), the Court wrote:

> [W]here the offense is not capital and the accused is not in custody, the prevailing rule has been, that if, *after the trial has begun in his presence*, he voluntarily absents himself, this does not nullify what has been done or prevent the completion of the trial . . . .

223 U.S. at 455 (emphasis added).

The limited nature of this ruling is underscored by the fact that in every case discussed by the Court in support of its holding in *Diaz*, the defendant had appeared at the commencement of trial, unlike the situation presented here. *See Barton v. State*, 67 Ga. 653 (1881)(defendant waived his right to be present at the reading of the verdict); *Falk v. U.S.*, 15 App.D.C. 446, 454 (1899), *rev'd on other grounds*, 180 U.S. 636 (1901)(mem.)(defendant had been present at commencement of the trial and for some testimony and then fled the jurisdiction).

In 1974, Rule 43 was amended to include subdivision (b)(2), which codified the Court's decision in *Illinois v. Allen*, 397 U.S. 337. *See* Notes of Committee on the Judiciary, House Report No. 94-247. In *Allen*, the Court held that,

> a defendant can lose his right to be present at trial if, after he has been warned by the judge that he will be removed if he continues his disruptive behavior, he nevertheless insists on conducting himself in a manner so disorderly, disruptive, and disrespectful of the court that his trial cannot be carried on with him in the courtroom.

Id. at 343.

Like *Lewis* and *Diaz*, the holding in *Allen* plainly assumes that the defendant will be present when the trial begins. A defendant cannot be removed after a warning unless he was present initially. Moreover, the facts of *Allen* support this reading, since Allen was present for a portion of *voir dire* before he began to disrupt the proceedings.[14]

---

[14] One may argue that trial commences with opening arguments and not with *voir dire*. However, the case law does not support this view. The Court in *Diaz* recognized that in felony cases courts had extended the right to be present through all phases of the trial, from impaneling the jury to imposition of the verdict. *Diaz*, 223 U.S. at 454. The Court in *Lewis* also stated that, in a felony case, the trial begins at least from the time when the work of impaneling a jury begins. *Lewis*, 146 U.S at 374, *citing Hopt v. Utah*, 110 U.S. 574 (1884). The language of Rule 43(a) supports this view by describing the act of impaneling the jury as part of the trial process.

By contrast, Crosby was not present for any portion of the trial, including the impaneling of the jury.[15] This result is inconsistent with the case law relied on by the drafters of Rule 43, both when the Rule was first adopted and when it was amended in 1974.

C. The Decision To Conduct An Entire Trial Without The Presence Of The Criminal Defendant Raises Significant Constitutional Issues That This Court Should Not Address Until They Are First Considered By The Drafters Of Rule 43

It is axiomatic that statutes (and rules) should be construed to avoid constitutional questions whenever possible. *See DeBartolo v. Florida Gulf Coast and Const. Trades Council*, 485 U.S. 568, 575 (1988); *NLRB v. Catholic Bishop of Chicago*, 440 U.S. 490, 499-501 (1979). The lower courts in this case followed precisely the opposite course by adopting a strained interpretation of Rule 43 that would permit an entire criminal trial to be conducted in the defendant's absence. This Court can and should correct that error by insisting that the constitutional values at stake first be weighed and considered by the drafters of Rule 43.

A defendant's right to be present at his own trial is firmly protected by both the Sixth and Fourteenth Amendments. In particular, the Sixth Amendment's Confrontation Clause protects a defendant's right to meet adverse witnesses face-to-face, and to cross-examine them. *Pennsylvania v. Ritchie*, 480 U.S. 39, 51 (1987). This allows the defendant to test the recollection of a witness and sift the witness' conscience. *Ohio v. Roberts*, 448 U.S. 56, 63-64 (1980). *See also Chambers v. Mississippi*, 410 U.S. 284, 295 (1973); *Mattox v. United States*, 156 U.S. 237, 242-43 (1895). Moreover, a defendant's face-to-face confrontation with a witness may make it more difficult for the witness to lie on the stand. *See Coy v. Iowa*, 487 U.S. 1012 (1988)(Sixth Amendment was violated where a screen was placed between defendant and the child he allegedly raped).[16] Conversely, the absence of such confrontation calls into question the integrity of the proceedings even if defense counsel has an opportunity to cross-examine government witnesses in the defendant's absence. *Chambers*, 410 U.S at 95.

In addition to the Sixth Amendment, the decision to try a defendant *in absentia* also raises obvious due process concerns. Acknowledging this concern in *Kentucky v. Stincer*, 482 U.S. 730 (1987), the Court held that a defendant has a right to be present in court whenever the proceedings involve an opportunity to defend against the government's charges. *Id.* at 745, *citing Snyder v. Massachusetts*, 291 U.S. 97 (1934).

The nature of this due process interest was more fully explored in *Snyder*. As the Court explained in that case, a defendant must be present at trial "to give advice or suggestion or even to supersede his lawyers altogether and conduct the trial himself." *Id.* at 106.[17] This is par-

---

[15] The district court's order, dated October 14, 1988, stated that fifty-four jurors were ready on October 12, 1988, the day the trial was to begin. *Crosby*, 917 F.2d at 363. This could only mean that a panel of potential jurors stood ready for *voir dire*, which had not yet begun.

[16] In *Coy*, the Court acknowledged that its encounters with the Confrontation Clause have generally been on questions of admissibility of out-of-court statements or on restrictions on the scope of cross-examination. 487 U.S. at 1016. A defendant's absence from trial presents a different question because, unlike the hearsay rule and cross-examination cases, the defendant has not confronted any witnesses at all. The question may more squarely focus our attention on why we value confrontation so highly that the integrity of judicial proceedings rests upon it.

[17] Although the Court found that the defendant did not have the right to be present when the jury was taken to the scene of the crime the (continued...)

ticularly true, as *Snyder* points out, "when evidence is offered." *Id.* at 114. *See also Powell v. Alabama*, 287 U.S. 45, 59 (1932); *Dowell v. United States*, 221 U.S. 325, 329-30 (1911).

The importance of these rights cannot be denied and, while they may not be absolute, they should not be overridden in the name of Rule 43 without some clear indication that this result was intended by the Rule's drafters. By ignoring this precept of judicial restraint, the decision below has raised constitutional issues that may never become ripe if Rule 43 remains in its present form. This Court should not compound that error by anticipating a constitutional controversy that can easily be avoided by applying Rule 43 as it is actually written.

---

[17] (...continued)
defendant was convicted of committing, it rested the judgment on the fact that nothing was said to the jurors to direct their attention to particulars, taking care to distinguish the jury trip to the scene from the "trial."

CONCLUSION

For the reasons stated herein, the judgment below should be reversed.

Respectfully submitted,

Steven R. Shapiro
(*Counsel of Record*)
Maya Wiley
John A. Powell
American Civil Liberties Union
Foundation
132 West 43 Street
New York, New York 10036
(212) 944-9800

Dated: April 15, 1992